# 61980J0100

**Judgment of the Court of 7 June 1983. - SA Musique Diffusion française and others v Commission of the European Communities. - Competition - Parallel importsof hi-fi equipment. - Joined cases 100 to 103/80.**

*European Court reports 1983 Page 01825*
*Spanish special edition Page 00447*
*Swedish special edition Page 00133*
*Finnish special edition Page 00133*



## Keywords

*1 . COMPETITION - ADMINISTRATIVE PROCEDURE - INAPPLICABILITY OF ARTICLE 6 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS*

*2.COMMUNITY LAW - PRINCIPLES - OBSERVANCE OF THE RIGHT TO A FAIR HEARING - FUNDAMENTAL PRINCIPLE - SPHERE OF APPLICATION - COMPETITION - ADMINISTRATIVE PROCEDURE - SCOPE OF THE PRINCIPLE*

*( COUNCIL REGULATION NO 17 , ART . 19 ( 1 ); REGULATION NO 99/63 OF THE COMMISSION , ART . 4 )*

*3.COMPETITION - ADMINISTRATIVE PROCEDURE - OBSERVANCE OF THE RIGHT TO A FAIR HEARING - STATEMENT OF OBJECTIONS - REQUIRED CONTENTS*

*( COUNCIL REGULATION NO 17 , ART . 19 ( 1 ); REGULATION NO 99/63 OF THE COMMISSION , ART . 4 )*

*4.COMPETITION - ADMINISTRATIVE PROCEDURE - OBSERVANCE OF THE RIGHT TO A FAIR HEARING - STATEMENT OF OBJECTIONS - REQUIRED CONTENTS - INDICATION OF THE CRITERIA FOR CALCULATION OF THE PROPOSED FINE - INDICATION BEFORE THE APPROPRIATE TIME*

*( COUNCIL REGULATION NO 17 ; REGULATION NO 99/63 OF THE COMMISSION , ART . 4 )*

*5.COMPETITION - ADMINISTRATIVE PROCEDURE - OBSERVANCE OF THE RIGHT TO A FAIR HEARING - NON-DISCLOSURE TO UNDERTAKINGS OF DOCUMENTS ON WHICH THE COMMISSION ' S FINDINGS WERE BASED - COMMISSION ' S FINAL DECISION BASED ON THE CONTENTS OF THE DISPUTED DOCUMENTS - BREACH OF THE RIGHT TO A FAIR HEARING - STATEMENTS CONCERNING MATTERS OF PURELY SECONDARY IMPORTANCE - VALIDITY OF THE FINAL DECISION AS A WHOLE - REVIEW BY THE COURT OF THE MERITS OF THE DECISION - CONSIDERATION OF THE CONTESTED DOCUMENTS - NOT APPROPRIATE*

*( COUNCIL REGULATION NO 17 , ART . 19 ( 1 ); REGULATION NO 99/63 OF THE COMMISSION , ART . 4 )*

*6.COMPETITION - ADMINISTRATIVE PROCEDURE - OBSERVANCE OF THE RIGHT TO A FAIR HEARING - CONSULTATION OF THE ADVISORY COMMITTEE ON RESTRICTIVE PRACTICES AND DOMINANT POSITIONS - NON-DISCLOSURE TO THE UNDERTAKINGS CONCERNED - PERMISSIBILITY*

*( COUNCIL REGULATION NO 17 , ART . 10 ( 6 ))*

*7.COMPETITION - AGREEMENTS , DECISIONS AND CONCERTED PRACTICES - AGREEMENTS BETWEEN UNDERTAKINGS - EXCLUSIVE DISTRIBUTION AGREEMENTS - COMPANY WHOSE OBJECT IS TO IMPORT AND ORGANIZE THE SALE OF PRODUCTS IN SEVERAL MEMBER STATES - CENTRAL POSITION OCCUPIED BY THE COMPANY IN THE SALES ORGANIZATION AND IN THE COORDINATION OF*

*NATIONAL DISTRIBUTORS - DUTY OF VIGILANCE INCUMBENT UPON THE COMPANY REGARDING COMPETITION RULES*

*( EEC TREATY , ART . 85 ( 1 ))*

*8.COMPETITION - AGREEMENTS , DECISIONS AND CONCERTED PRACTICES - AGREEMENTS BETWEEN UNDERTAKINGS - EFFECT ON TRADE BETWEEN MEMBER STATES - CRITERIA - INSIGNIFICANT EFFECT ON THE MARKET - AGREEMENT NOT PROHIBITED*

*( EEC TREATY , ART . 85 ( 1 ))*

*9.COMPETITION - AGREEMENTS , DECISIONS AND CONCERTED PRACTICES - AGREEMENTS BETWEEN UNDERTAKINGS - EXCLUSIVE DISTRIBUTION AGREEMENTS - CONDUCT ON THE PART OF EXCLUSIVE DISTRIBUTORS INTENDED TO RESTRAIN PARALLEL IMPORTS - EFFECT ON TRADE BETWEEN MEMBER STATES - CRITERIA*

*( EEC TREATY , ART . 85 ( 1 ))*

*10.COMPETITION - AGREEMENTS , DECISIONS AND CONCERTED PRACTICES - PROHIBITION - INFRINGEMENTS - JUSTIFICATION - PARALLEL IMPORTS - NO JUSTIFICATION*

*( EEC TREATY , ART . 85 ( 1 ))*

*11.COMPETITION - AGREEMENTS , DECISIONS AND CONCERTED PRACTICES - NOTIFICATION - EFFECTS - IMPOSITION OF A FINE IN RESPECT OF AN INFRINGEMENT NOT NOTIFIED - DEFENCE BASED ON POSSIBILITY OF EXEMPTION - INADMISSIBILITY*

*( EEC TREATY , ART . 85 ( 3 ); COUNCIL REGULATION NO 17 , ART . 4 )*

*12.COMPETITION - COMMUNITY RULES - INFRINGEMENTS - FINE - INFRINGEMENT COMMITTED INTENTIONALLY OR NEGLIGENTLY - ACCOUNTABILITY OF AN UNDERTAKING FOR THE CONDUCT OF THOSE AUTHORIZED TO ACT ON ITS BEHALF - CONDITIONS*

*( COUNCIL REGULATION NO 17 , ART . 15 ( 1 ) AND ( 2 ))*

*13.COMPETITION - AGREEMENTS , DECISIONS AND CONCERTED PRACTICES - PROHIBITION - INFRINGEMENTS - JUSTIFICATION - RESTRICTIONS IMPOSED BY PUBLIC AUTHORITIES - NO JUSTIFICATION*

*( EEC TREATY , ART . 85 )*

*14.COMPETITION - COMMUNITY RULES - INFRINGEMENTS - FINES - PURPOSE - DETERMINATION - CRITERIA - GRAVITY OF THE INFRINGEMENTS - BASIS OF ASSESSMENT*

*( COUNCIL REGULATION NO 17 , ART . 15 ( 1 ) AND ( 2 ))*

*15.COMPETITION - COMMUNITY RULES - INFRINGEMENTS - FINES - DETERMINATION - CRITERIA - RAISING OF THE GENERAL LEVEL OF FINES - PERMISSIBILITY - CONDITIONS*

*( COUNCIL REGULATION NO 17 , ART . 15 ( 1 ) AND ( 2 ))*

*16.COMPETITION - COMMUNITY RULES - INFRINGEMENTS - FINES - DETERMINATION - CRITERIA - TOTAL TURNOVER OF THE UNDERTAKING CONCERNED - TURNOVER ACCOUNTED FOR BY THE GOODS IN RESPECT OF WHICH THE INFRINGEMENT WAS COMMITTED - CONSIDERATION OF BOTH FACTORS - LIMITS*

*( COUNCIL REGULATION NO 17 , ART . 15 ( 1 ) AND ( 2 ))*

*17.COMPETITION - COMPETITION RULES - INFRINGEMENTS - FINE - INFRINGEMENTS TREATED AS A SINGLE OFFENCE - CONCEPT - IMPOSITION OF A SINGLE FINE - PERMISSIBILITY*

*( COUNCIL REGULATION , NO 17 , ART . 15 )*

## Summary

*1 . ALTHOUGH THE COMMISSION IS BOUND TO OBSERVE THE PROCEDURAL SAFEGUARDS CONTAINED IN THE PROVISIONS OF COMMUNITY LAW ON COMPETITION , THAT DOES NOT MEAN THAT WHEN IT APPLIES THOSE PROVISIONS IT CAN BE DESCRIBED AS A ' ' TRIBUNAL ' ' WITHIN THE MEANING OF ARTICLE 6 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS , BY VIRTUE OF WHICH EVERYONE IS ENTITLED TO A FAIR HEARING BY AN INDEPENDENT AND IMPARTIAL TRIBUNAL .*

*2.THE PROCEDURAL SAFEGUARDS CONTAINED IN ARTICLE 19 ( 1 ) OF REGULATION NO 17 AND IN REGULATION NO 99/63 ARE AN APPLICATION OF THE FUNDAMENTAL PRINCIPLE OF COMMUNITY LAW WHICH REQUIRES THE RIGHT TO A FAIR HEARING TO BE OBSERVED IN ALL PROCEEDINGS , EVEN THOSE OF AN ADMINISTRATIVE NATURE , AND LAYS DOWN IN PARTICULAR THAT THE UNDERTAKING CONCERNED MUST HAVE BEEN AFFORDED THE OPPORTUNITY , DURING THE ADMINISTRATIVE PROCEDURE , TO MAKE KNOWN ITS VIEWS ON THE TRUTH AND RELEVANCE OF THE FACTS AND CIRCUMSTANCES ALLEGED AND ON THE DOCUMENTS USED BY THE COMMISSION TO SUPPORT ITS CLAIM THAT THERE HAS BEEN AN INFRINGEMENT OF THE TREATY .*

*3.THE STATEMENT OF OBJECTIONS MUST SET FORTH CLEARLY ALL THE ESSENTIAL FACTS UPON WHICH THE COMMISSION IS RELYING AT THAT STAGE OF THE PROCEDURE FOR THE APPLICATION OF THE COMMUNITY COMPETITION RULES . THAT MAY BE DONE SUMMARILY AND THE SUBSEQUENT DECISION IS NOT NECESSARILY REQUIRED TO BE A REPLICA OF THE STATEMENT OF OBJECTIONS . THE COMMISSION MUST TAKE INTO ACCOUNT THE FACTORS EMERGING FROM THE ADMINISTRATIVE PROCEDURE IN ORDER EITHER TO ABANDON SUCH OBJECTIONS AS HAVE BEEN SHOWN TO BE UNFOUNDED OR TO AMEND AND SUPPLEMENT ITS ARGUMENTS , BOTH IN FACT AND IN LAW , IN SUPPORT OF THE OBJECTIONS WHICH IT MAINTAINS , PROVIDED HOWEVER THAT IT RELIES ONLY ON FACTS ON WHICH THE PARTIES CONCERNED HAVE HAD AN OPPORTUNITY TO MAKE KNOWN THEIR VIEWS AND PROVIDED THAT , IN THE COURSE OF THE ADMINISTRATIVE PROCEDURE , IT HAS MADE AVAILABLE TO THEM THE INFORMATION NECESSARY FOR THEIR DEFENCE .*

*4.WHERE IN ITS STATEMENT OF OBJECTIONS THE COMMISSION EXPRESSLY STATES THAT IT WILL CONSIDER WHETHER IT IS APPROPRIATE TO IMPOSE FINES ON THE UNDERTAKINGS CONCERNED AND INDICATES THE MAIN FACTUAL AND LEGAL CRITERIA CAPABLE OF ATTRACTING A FINE , SUCH AS THE GRAVITY AND THE DURATION OF THE ALLEGED INFRINGEMENT AND WHETHER THAT INFRINGEMENT WAS COMMITTED ' ' INTENTIONALLY OR NEGLIGENTLY ' ' , IT FULFILS ITS OBLIGATION TO RESPECT THE RIGHT OF UNDERTAKINGS TO BE HEARD , INASMUCH AS IT GIVES THEM THE NECESSARY DETAILS TO ENABLE THEM TO DEFEND THEMSELVES NOT MERELY AGAINST THE FINDING OF AN INFRINGEMENT BUT ALSO AGAINST THE IMPOSITION OF FINES .*

*ON THE OTHER HAND , THE UNDERTAKINGS CANNOT REQUIRE THE COMMISSION TO INDICATE TO THEM , IN THE COURSE OF THE ADMINISTRATIVE PROCEDURE , THE CRITERIA ON THE BASIS OF WHICH IT INTENDS TO CALCULATE THE FINES . TO GIVE INDICATIONS AS REGARDS THE LEVEL OF THE FINES ENVISAGED , BEFORE THE UNDERTAKINGS HAVE BEEN GIVEN AN OPPORTUNITY TO SUBMIT THEIR OBSERVATIONS ON THE ALLEGATIONS AGAINST THEM , WOULD BE TO ANTICIPATE THE COMMISSION ' S DECISION AND WOULD THUS BE INAPPROPRIATE .*

*5.IF THE UNDERTAKINGS AGAINST WHICH PROCEEDINGS UNDER THE COMMUNITY COMPETITION RULES HAVE BEEN BROUGHT WERE NOT ACQUAINTED OR WERE ONLY PARTIALLY ACQUAINTED , BEFORE THE COMMISSION ADOPTED ITS FINAL DECISION , WITH THE DOCUMENTS ON WHICH THE COMMISSION BASED ITS FINDINGS , THE COMMISSION CANNOT BASE ITS FINAL DECISION ON THE CONTENTS OF THOSE DOCUMENTS .*

*HOWEVER , IN SO FAR AS THE SAID FINDINGS RELATE TO MATTERS WHICH ARE OF PURELY SECONDARY IMPORTANCE IN RELATION TO THE INFRINGEMENTS FOUND TO HAVE BEEN COMMITTED IN THE FINAL DECISION , THAT BREACH OF THE RIGHT TO A FAIR HEARING CANNOT AFFECT THE VALIDITY OF THE WHOLE OF THE DECISION . INSTEAD , IT IS APPROPRIATE FOR THE COURT TO DISREGARD THE CONTENT OF THOSE DOCUMENTS WHEN CONSIDERING THE SUBSTANTIVE VALIDITY OF THE DECISION .*

*6.IT IS CLEAR FROM ARTICLE 10 ( 6 ) OF REGULATION NO 17 THAT CONSULTATION OF THE ADVISORY COMMITTEE ON RESTRICTIVE PRACTICES AND DOMINANT POSITIONS REPRESENTS THE FINAL STAGE OF THE PROCEDURE FOR ESTABLISHING INFRINGEMENTS OF THE COMMUNITY COMPETITION RULES BEFORE THE ADOPTION OF THE FINAL DECISION AND THE OPINION IS GIVEN ON THE BASIS OF A DRAFT OF THE DECISION . TO GIVE THE UNDERTAKINGS THE OPPORTUNITY OF MAKING THEIR VIEWS KNOWN ON THAT OPINION AND , THEREFORE , ON THE DRAFT DECISION WOULD AMOUNT TO REOPENING THE PREVIOUS STAGE OF THE PROCEDURE , WHICH WOULD BE CONTRARY TO THE SYSTEM INTENDED BY THE REGULATION . MOREOVER , REGARDLESS OF THE OPINION OF THE COMMITTEE , THE COMMISSION MAY BASE ITS DECISION ONLY ON FACTS ON WHICH THE UNDERTAKINGS HAVE HAD THE OPPORTUNITY OF MAKING KNOWN THEIR VIEWS . THE FAILURE TO DISCLOSE THE OPINION IS NOT CONTRARY THEREFORE TO THE PRINCIPLE OF THE RIGHT TO A FAIR HEARING .*

*7.A COMPANY WHOSE PURPOSE IS TO IMPORT AND ORGANIZE THE SALE OF PRODUCTS IN SEVERAL MEMBER STATES AND WHICH TO THAT END ATTEMPTS TO FIND A DISTRIBUTOR IN EACH OF THE MEMBER STATES IN QUESTION , OFFERS IT AN EXCLUSIVE DISTRIBUTORSHIP AGREEMENT , DIVIDES THE PRODUCTS IMPORTED AMONGST THE NATIONAL DISTRIBUTORS AND SEEKS TO COORDINATE THEIR SALES EFFORTS , INTER ALIA BY HOLDING REGULAR MEETINGS , IS OBLIGED , ON ACCOUNT OF ITS CENTRAL POSITION , TO DISPLAY PARTICULAR VIGILANCE IN ORDER TO PREVENT CONCERTED EFFORTS OF THAT KIND FROM GIVING RISE TO PRACTICES CONTRARY TO THE COMPETITION RULES , EVEN IF THOSE ACTIVITIES DO NOT NECESSARILY CONFER ON IT A DECISIVE INFLUENCE ON THE CONDUCT OF EACH OF THE DISTRIBUTORS .*

*8.IF AN AGREEMENT IS TO BE CAPABLE OF AFFECTING TRADE BETWEEN MEMBER STATES IT MUST BE POSSIBLE TO FORESEE WITH A SUFFICIENT DEGREE OF PROBABILITY , ON THE BASIS OF A SET OF OBJECTIVE FACTORS OF LAW OR OF FACT , THAT THE AGREEMENT IN QUESTION MAY HAVE AN INFLUENCE , DIRECT OR INDIRECT , ACTUAL OR POTENTIAL , ON THE PATTERN OF TRADE BETWEEN MEMBER STATES IN SUCH A WAY THAT IT MIGHT HINDER THE ATTAINMENT OF THE OBJECTIVES OF A SINGLE MARKET BETWEEN STATES .*

*EVEN AN EXCLUSIVE DEALING AGREEMENT WITH ABSOLUTE TERRITORIAL PROTECTION MAY ESCAPE*

*THE PROHIBITION LAID DOWN IN ARTICLE 85 WHERE IT AFFECTS THE MARKET ONLY INSIGNIFICANTLY , REGARD BEING HAD TO THE WEAK POSITION OF THE PERSONS CONCERNED ON THE MARKET IN THE PRODUCTS IN QUESTION .*

*9.IF A COMPANY ENTRUSTED WITH EXCLUSIVE DISTRIBUTION IN THE TERRITORY OF A MEMBER STATE HAS A PERCENTAGE GREATER THAN THAT OF THE MAJORITY OF ITS COMPETITORS IN THE MARKET IN THE PRODUCTS IN QUESTION , WHICH IS VERY LARGE BUT IS MARKEDLY DIVIDED BETWEEN A VERY GREAT NUMBER OF BRANDS , IT CANNOT BE DENIED , REGARD BEING HAD TO ITS ABSOLUTE TURNOVER FIGURES , THAT CONDUCT BY THAT UNDERTAKING SEEKING TO RESTRAIN PARALLEL IMPORTS AND THEREFORE TO PARTITION NATIONAL MARKETS MAY EXERCISE AN INFLUENCE ON THE PATTERN OF TRADE BETWEEN MEMBER STATES IN A WAY CAPABLE OF HINDERING THE ATTAINMENT OF THE OBJECTIVES OF A SINGLE MARKET .*

*10.THE MERE FACT OF THE IMPORTATION OF GOODS WHICH HAVE BEEN LAWFULLY MARKETED IN ANOTHER MEMBER STATE CANNOT BE CONSIDERED AN UNFAIR COMMERCIAL PRACTICE . PARALLEL IMPORTS FROM OTHER MEMBER STATES CANNOT THEREFORE , BY THEMSELVES , GIVE RISE TO A SITUATION OF LEGITIMATE SELF-PROTECTION JUSTIFYING AN INFRINGEMENT OF THE PROHIBITION CONTAINED IN ARTICLE 85 ( 1 ) OF THE TREATY .*

*11.THE NOTIFICATION OF AGREEMENTS IS NOT A FORMALITY IMPOSED ON UNDERTAKINGS BUT AN INDISPENSABLE CONDITION FOR OBTAINING CERTAIN BENEFITS . UNDER THE TERMS OF ARTICLE 15 ( 5 ) ( A ) OF REGULATION NO 17 NO FINE MAY BE IMPOSED IN RESPECT OF ACTS TAKING PLACE AFTER NOTIFICATION , PROVIDED THEY FALL WITHIN THE LIMITS OF THE ACTIVITY DESCRIBED IN THE NOTIFICATION . THAT ADVANTAGE ENJOYED BY AN UNDERTAKING WHICH NOTIFIES AN AGREEMENT OR CONCERTED PRACTICE IS THE COUNTERPART OF THE RISK INCURRED BY THE UNDERTAKING IN ITSELF REPORTING THE AGREEMENT OR CONCERTED PRACTICE . THAT UNDERTAKING IN FACT TAKES THE RISK NOT ONLY OF HAVING THE AGREEMENT OR PRACTICE FOUND TO BE IN BREACH OF ARTICLE 85 ( 1 ) OF THE TREATY AND OF HAVING THE APPLICATION OF SUBPARAGRAPH ( 3 ) REFUSED BUT ALSO OF BEING PUNISHED BY A FINE FOR ITS ACTS PRIOR TO NOTIFICATION . A FORTIORI , AN UNDERTAKING WHICH DID NOT WISH TO RUN THAT RISK CANNOT CLAIM , ON BEING FINED FOR AN INFRINGEMENT IN RESPECT OF AN AGREEMENT WHICH WAS NOT NOTIFIED , THAT THERE WAS A HYPOTHETICAL POSSIBILITY THAT NOTIFICATION MIGHT HAVE LED TO AN EXEMPTION .*

*12.THE APPLICATION OF ARTICLE 15 ( 1 ) AND ( 2 ) OF REGULATION NO 17 , WHICH EMPOWERS THE COMMISSION TO IMPOSE ON UNDERTAKINGS OR ASSOCIATIONS OF UNDERTAKINGS FINES WHERE , INTENTIONALLY OR NEGLIGENTLY , THEY HAVE BEEN GUILTY OF INFRINGEMENTS , IS NOT CONDITIONAL UPON ACTION BY , OR EVEN KNOWLEDGE ON THE PART OF , THE PARTNERS OR PRINCIPAL MANAGERS OF THE UNDERTAKING CONCERNED BUT UPON ACTION BY A PERSON WHO IS AUTHORIZED TO ACT ON BEHALF OF THE UNDERTAKING .*

*13.RESTRICTIONS ON INTRA-COMMUNITY TRADE IMPOSED BY PUBLIC AUTHORITIES CANNOT JUSTIFY THE IMPLEMENTATION , BY PRIVATE PERSONS , OF CONCERTED PRACTICES INTENDED TO RESTRICT COMPETITION .*

*14.IN ASSESSING THE GRAVITY OF AN INFRINGEMENT FOR THE PURPOSE OF FIXING THE AMOUNT OF THE FINE , THE COMMISSION MUST TAKE INTO CONSIDERATION NOT ONLY THE PARTICULAR CIRCUMSTANCES OF THE CASE BUT ALSO THE CONTEXT IN WHICH THE INFRINGEMENT OCCURS AND MUST ENSURE THAT ITS ACTION HAS THE NECESSARY DETERRENT EFFECT , ESPECIALLY AS REGARDS THOSE TYPES OF INFRINGEMENT WHICH ARE PARTICULARLY HARMFUL TO THE ATTAINMENT OF THE OBJECTIVES OF THE COMMUNITY .*

*THE COMMISSION IS RIGHT TO CLASSIFY AS VERY SERIOUS INFRINGEMENTS PROHIBITIONS ON EXPORTS AND IMPORTS SEEKING ARTIFICIALLY TO MAINTAIN PRICE DIFFERENCES BETWEEN THE MARKETS OF THE VARIOUS MEMBER STATES . SUCH PROHIBITIONS JEOPARDIZE THE FREEDOM OF INTRA-COMMUNITY TRADE , WHICH IS A FUNDAMENTAL PRINCIPLE OF THE TREATY , AND THEY PREVENT THE ATTAINMENT OF ONE OF ITS OBJECTIVES , NAMELY THE CREATION OF A SINGLE MARKET .*

*15.THE FACT THAT THE COMMISSION IN THE PAST IMPOSED FINES OF A CERTAIN LEVEL FOR CERTAIN TYPES OF INFRINGEMENT DOES NOT MEAN THAT IT IS ESTOPPED FROM RAISING THAT LEVEL WITHIN THE LIMITS INDICATED IN REGULATION NO 17 IF THAT IS NECESSARY TO ENSURE THE IMPLEMENTATION OF COMMUNITY COMPETITION POLICY . ON THE CONTRARY , THE PROPER APPLICATION OF THE COMMUNITY COMPETITION RULES REQUIRES THAT THE COMMISSION MAY AT ANY TIME ADJUST THE LEVEL OF FINES TO THE NEEDS OF THAT POLICY .*

*16.IN ASSESSING THE GRAVITY OF AN INFRINGEMENT REGARD MUST BE HAD TO A LARGE NUMBER OF FACTORS , THE NATURE AND IMPORTANCE OF WHICH VARY ACCORDING TO THE TYPE OF INFRINGEMENT IN QUESTION AND THE PARTICULAR CIRCUMSTANCES OF THE CASE . THOSE FACTORS MAY , DEPENDING ON THE CIRCUMSTANCES , INCLUDE THE VOLUME AND THE VALUE OF THE GOODS IN RESPECT OF WHICH THE INFRINGEMENT WAS COMMITTED AND THE SIZE AND ECONOMIC POWER OF THE UNDERTAKING AND , CONSEQUENTLY , THE INFLUENCE WHICH THE UNDERTAKING WAS ABLE TO EXERT ON THE MARKET .*

*IT FOLLOWS THAT , ON THE ONE HAND , IT IS PERMISSIBLE , FOR THE PURPOSE OF FIXING THE FINE , TO HAVE REGARD BOTH TO THE TOTAL TURNOVER OF THE UNDERTAKING , WHICH GIVES AN INDICATION , ALBEIT APPROXIMATE AND IMPERFECT , OF THE SIZE OF THE UNDERTAKING AND OF ITS ECONOMIC POWER , AND TO THE PROPORTION OF THAT TURNOVER ACCOUNTED FOR BY THE GOODS IN RESPECT OF WHICH THE INFRINGEMENT WAS COMMITTED , WHICH GIVES AN INDICATION OF THE SCALE OF THE INFRINGEMENT . ON THE OTHER HAND , IT FOLLOWS THAT IT IS IMPORTANT NOT TO CONFER ON ONE OR THE OTHER OF THOSE FIGURES AN IMPORTANCE DISPROPORTIONATE TO THE OTHER FACTORS AND , CONSEQUENTLY , THAT THE FIXING OF AN APPROPRIATE FINE CANNOT BE THE RESULT OF A SIMPLE CALCULATION BASED ON THE TOTAL TURNOVER . THAT IS PARTICULARLY THE CASE WHERE THE GOODS CONCERNED ACCOUNT FOR ONLY A SMALL PART OF THAT FIGURE .*

*17.IF AN UNDERTAKING HAS PARTICIPATED IN TWO CONCERTED PRACTICES WHICH WERE BOTH DESIGNED TO PREVENT PARALLEL IMPORTS TO A PARTICULAR COUNTRY OF GOODS PRODUCED BY THE SAME FIRM , THE COMMISSION IS ENTITLED TO TREAT THE INFRINGEMENTS AS A SINGLE OFFENCE AND THEREFORE TO IMPOSE A SINGLE FINE .*

## Parties

*IN JOINED CASES 100-103/80*

*100/80*

*MUSIQUE DIFFUSION FRANCAISE SA , VELIZY , REPRESENTED BY R . COLLIN , OF THE PARIS BAR , AND L . DE GRYSE , ADVOCATE WITH RIGHT OF AUDIENCE BEFORE THE COURT OF CASSATION , BELGIUM , WITH AN ADDRESS FOR SERVICE IN LUXEMBOURG AT THE CHAMBERS OF E . ARENDT , 34 RUE PHILIPPE-II ,*

*101/80*

*C . MELCHERS & CO , BREMEN , REPRESENTED BY J . F . BELLIS AND I . VAN BAEL , OF THE BRUSSELS BAR , WITH AN ADDRESS FOR SERVICE IN LUXEMBOURG AT THE CHAMBERS OF MESSRS ELVINGER AND HOSS , 15 COTE D ' EICH ,*

*102/80*

*PIONEER ELECTRONIC ( EUROPE ) NV , ANTWERP , REPRESENTED BY M . WAELBROECK , OF THE BRUSSELS BAR , WITH AN ADDRESS FOR SERVICE IN LUXEMBOURG AT THE CHAMBERS OF E . ARENDT , 34 RUE PHILIPPE-II ,*

*103/80*

*PIONEER HIGH FIDELITY ( GB ) LIMITED , LONDON , REPRESENTED BY J . E . RAYNER-JAMES , BARRISTER OF LINCOLN ' S INN , INSTRUCTED BY D . F . HALL OF LINKLATERS & PAINES , SOLICITORS , LONDON , WITH AN ADDRESS FOR SERVICE IN LUXEMBOURG AT THE CHAMBERS OF MESSRS ELVINGER AND HOSS , 15 COTE D ' EICH ,*

*APPLICANTS ,*

*V*

*COMMISSION OF THE EUROPEAN COMMUNITIES , REPRESENTED BY ITS LEGAL ADVISER , J . TEMPLE LANG , AND BY M.-J . JONCZY AND GOTZ ZUR HAUSEN , MEMBERS OF ITS LEGAL DEPARTMENT , ACTING AS AGENTS , WITH AN ADDRESS FOR SERVICE IN LUXEMBOURG AT THE OFFICE OF ITS LEGAL ADVISER , O . MONTALTO , JEAN MONNET BUILDING , KIRCHBERG ,*

*DEFENDANT ,*

## Subject of the case

*APPLICATION FOR A DECLARATION THAT THE COMMISSION ' S DECISION OF 14 DECEMBER 1979 RELATING TO A PROCEEDING UNDER ARTICLE 85 OF THE EEC TREATY ( IV.29.595 - PIONEER HI-FI EQUIPMENT ), PUBLISHED IN OFFICIAL JOURNAL L 60 OF 5 MARCH 1980 AT P . 21 , IS VOID ,*

## Grounds

*1 BY APPLICATIONS REGISTERED AT THE COURT ON 21 , 24 AND 25 MARCH 1980 , THE FOUR*

*UNDERTAKINGS MUSIQUE DIFFUSION FRANCAISE SA , C . MELCHERS & CO ., PIONEER ELECTRONIC ( EUROPE ) NV AND PIONEER HIGH FIDELITY ( GB ) LIMITED BROUGHT ACTIONS , PURSUANT TO THE SECOND PARAGRAPH OF ARTICLE 173 OF THE EEC TREATY , FOR A DECLARATION THAT COMMISSION DECISION NO 80/256 OF 14 DECEMBER 1979 RELATING TO A PROCEEDING UNDER ARTICLE 85 OF THE EEC TREATY ( IV/29.595 - PIONEER HI-FI EQUIPMENT ), PUBLISHED IN OFFICIAL JOURNAL 1980 L 60 , IS VOID .*

*2 THE FOUR APPLICANTS FORM PART OF THE EUROPEAN DISTRIBUTION NETWORK FOR HIGH-FIDELITY SOUND-REPRODUCTION EQUIPMENT MANUFACTURED BY THE PIONEER ELECTRONIC CORPORATION OF TOKYO . MOST OF THE PIONEER PRODUCTS SOLD IN EUROPE ARE IMPORTED BY THE SUBSIDIARY , PIONEER ELECTRONIC ( EUROPE ) NV ( HEREINAFTER REFERRED TO AS ' ' PIONEER ' ' ), WHOSE REGISTERED OFFICE IS IN ANTWERP . AT THE TIME WHEN THE EVENTS OCCURRED ON WHICH THE CONTESTED DECISION IS BASED , THREE INDEPENDENT UNDERTAKINGS , NAMELY MUSIQUE DIFFUSION FRANCAISE SA , ( HEREINAFTER REFERRED TO AS ' ' MDF ' ' ), C . MELCHERS & CO . ( HEREINAFTER REFERRED TO AS ' ' MELCHERS ' ' ) AND SHRIRO UK LIMITED ( HEREINAFTER REFERRED TO AS ' ' SHRIRO ' ' ), ENJOYED EXCLUSIVE DISTRIBUTION RIGHTS IN FRANCE , THE FEDERAL REPUBLIC OF GERMANY AND THE UNITED KINGDOM RESPECTIVELY . IN THE MEANTIME SHRIRO HAS BECOME A SUBSIDIARY OF PIONEER AND HAS CHANGED ITS NAME TO PIONEER HIGH FIDELITY ( GB ) LIMITED ( HEREINAFTER REFERRED TO AS ' ' PIONEER GB ' ' ).*

*3 IN THE CONTESTED DECISION THE COMMISSION FOUND THAT THE FOUR APPLICANT UNDERTAKINGS HAD TAKEN PART IN CONCERTED PRACTICES , CONTRARY TO ARTICLES 85 ( 1 ) OF THE TREATY , CONSISTING IN THE PREVENTION OF IMPORTS OF PIONEER EQUIPMENT FROM THE FEDERAL REPUBLIC OF GERMANY AND THE UNITED KINGDOM INTO FRANCE FOR THE PURPOSE OF MAINTAINING A HIGHER LEVEL OF PRICES IN FRANCE . THE COMMISSION ALSO FOUND THAT ARTICLE 85 ( 3 ) WAS INAPPLICABLE TO THOSE PRACTICES AND IT IMPOSED A FINE OF 850 000 EUROPEAN UNITS OF ACCOUNT ON MDF , 4 350 000 UNITS OF ACCOUNT ON PIONEER , 1 450 000 UNITS OF ACCOUNT ON MELCHERS AND 300 000 UNITS OF ACCOUNT ON PIONEER GB .*

*4 THE DECISION STATED THAT THE CONCERTED PRACTICE BETWEEN MDF , PIONEER AND MELCHERS PREVENTING IMPORTS FROM THE FEDERAL REPUBLIC OF GERMANY CONSISTED IN A REFUSAL ON THE PART OF MELCHERS TO FULFIL AN ORDER PLACED ON 20 JANUARY 1976 BY A GERMAN WHOLESALER , OTTO GRUONER KG ( HEREINAFTER REFERRED TO AS ' ' GRUONER ' ' ), FOR PIONEER EQUIPMENT HAVING A VALUE OF APPROXIMATELY DM 550 000 , WHICH WAS TO BE DELIVERED BY THAT WHOLESALER TO A FRENCH PURCHASING GROUP THE GENERAL MANAGER OF WHICH WAS B . IFFLI OF METZ . THE CONCERTED PRACTICE BETWEEN MDF , PIONEER AND SHRIRO PREVENTING IMPORTS FROM THE UNITED KINGDOM MANIFESTED ITSELF , ACCORDING TO THE DECISION , IN PARTICULAR IN TWO LETTERS OF 28 AND 29 JANUARY 1976 WHICH THE DIRECTOR OF SHRIRO , MR TODD , SENT TO THE GENERAL MANAGER OF THE AUDIOTRONIC GROUP ( HEREINAFTER REFERRED TO AS ' ' AUDIOTRONIC ' ' ) AND TO THE CHAIRMAN OF COMET RADIOVISION SERVICES LIMITED ( HEREINAFTER REFERRED TO AS ' ' COMET ' ' ), THOSE TWO UNDERTAKINGS BEING THE MAIN CUSTOMERS OF SHRIRO , INVITING THEM TO CEASE EXPORTING PIONEER PRODUCTS .*

*5 THE SUBMISSIONS WHICH THE APPLICANTS PUT FORWARD AGAINST THE DECISION MAY IN ESSENCE BE GROUPED TOGETHER AS FOLLOWS :*

*A - INFRINGEMENT OF ESSENTIAL PROCEDURAL REQUIREMENTS , INASMUCH AS :*

*( A ) THE COMMISSION COMBINES THE FUNCTIONS OF JUDGE AND PROSECUTOR ;*

*( B)THE STATEMENT OF OBJECTIONS DID NOT MENTION ALL THE OBJECTIONS SET OUT IN THE DECISION OR THE CRITERIA ON THE BASIS OF WHICH THE COMMISSION INTENDED TO CALCULATE THE FINES ;*

*( C)IN SPITE OF REQUESTS BY THE APPLICANTS TO THAT EFFECT , THE COMMISSION DID NOT DISCLOSE IN DUE TIME ALL THE DOCUMENTS ON WHICH THE DECISION IS BASED ;*

*( D)THE OPINION OF THE ADVISORY COMMITTEE WAS NOT COMMUNICATED TO THE APPLICANTS .*

*B -WRONGFUL ASSESSMENT AND CLASSIFICATION OF THE FACTS ON THE BASIS OF WHICH THE COMMISSION FOUND THAT THERE HAD BEEN INFRINGEMENTS OF ARTICLE 85 ( 1 ) AS REGARDS :*

*( A)MELCHERS ' ALLEGED REFUSAL TO SELL ;*

*( B)THE EFFECTS OF THE LETTERS SENT BY MR TODD ;*

*( C)THE DURATION OF THE ALLEGED CONCERTED PRACTICES ;*

*( D)PIONEER ' S PARTICIPATION IN THOSE PRACTICES ;*

*( E)THE HI-FI MARKET SHARES HELD BY THE APPLICANTS IN FRANCE AND THE UNITED KINGDOM AND THEREFORE THE EFFECT OF THE CONCERTED PRACTICES ON TRADE BETWEEN MEMBER STATES .*

*C -FAILURE TO TAKE INTO ACCOUNT CIRCUMSTANCES PRECLUDING THE IMPOSITION OF FINES :*

*( A)LEGITIMATE SELF-PROTECTION AND NECESSITY , AS REGARDS MDF ;*

*( B)THE POSSIBILITY OF EXEMPTING THE CONCERTED PRACTICES UNDER ARTICLE 85 ( 3 );*

*( C)THE FACT THAT MELCHERS ' CONDUCT WAS IN CONFORMITY WITH ITS CONTRACTUAL OBLIGATIONS NOTIFIED TO THE COMMISSION ;*

*( D)THE ALLEGED PRINCIPLE ACCORDING TO WHICH ACTS COMMITTED BY EMPLOYEES WHO HAVE NOT RECEIVED INSTRUCTIONS FROM THE PARTNERS IN THE UNDERTAKING MAY NOT BE ATTRIBUTED TO THE UNDERTAKING ;*

*( E)THE COMMISSION ' S JOINT RESPONSIBILITY FOR PARTITIONING THE FRENCH MARKET BY AUTHORIZING THE FRENCH GOVERNMENT TO PROHIBIT PARALLEL IMPORTS .*

*D - FAILURE TO TAKE INTO ACCOUNT CIRCUMSTANCES JUSTIFYING THE IMPOSITION OF LOWER FINES*

*( A ) ERRONEOUS ASSESSMENT OF THE GRAVITY OF THE INFRINGEMENTS IN FIXING THE GENERAL LEVEL OF THE FINES AND BREACH OF THE PRINCIPLE OF EQUAL TREATMENT , INASMUCH AS THE FINES ARE MUCH GREATER THAN THOSE IMPOSED ON OTHER UNDERTAKINGS FOR SIMILAR INFRINGEMENTS COMMITTED DURING THE SAME PERIOD ;*

*( B)ABSENCE OF INTENTION ON THE PART OF PIONEER ;*

*( C)ERRONEOUS BASIS OF CALCULATION ON THE GROUNDS THAT THE FINES ARE PROPORTIONATE TO THE TOTAL TURNOVER OF THE UNDERTAKINGS , THAT IN THE CASE OF MELCHERS THE FINE EXCEEDS 10 % OF THE RELEVANT TURNOVER AND THAT , IN THE CASES OF MDF AND PIONEER , THE TURNOVER USED RELATES TO A DIFFERENT FINANCIAL YEAR FROM THAT USED IN THE CASE OF THE OTHER APPLICANTS ;*

*( D)ERRONEOUS APPRAISAL OF THE DURATION OF THE CONCERTED PRACTICES ;*

*( E)AS REGARDS MDF AND PIONEER , BREACH OF THE ALLEGED PRINCIPLE THAT A SINGLE FINE CANNOT BE IMPOSED BY COMBINING SEVERAL FINES FOR SEPARATE INFRINGEMENTS ;*

*( F)CONFISCATORY NATURE OF THE FINE IMPOSED ON MELCHERS AND BREACH OF THE PRINCIPLE OF PROPORTIONALITY INASMUCH AS THE FINE IMPOSED ON MDF EXCEEDS THE ECONOMIC CAPACITIES OF THE UNDERTAKING .*

*A - THE SUBMISSIONS RELATING TO AN INFRINGEMENT OF ESSENTIAL PROCEDURAL REQUIREMENTS*

*( A ) THE COMBINATION OF THE FUNCTIONS OF JUDGE AND PROSECUTOR*

*MDF MAINTAINS THAT THE CONTESTED DECISION IS UNLAWFUL BY THE MERE FACT THAT IT WAS ADOPTED UNDER A SYSTEM IN WHICH THE COMMISSION COMBINES THE FUNCTIONS OF PROSECUTOR AND JUDGE , WHICH IS CONTRARY TO ARTICLE 6 ( 1 ) OF THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS .*

*7 THAT ARGUMENT IS WITHOUT RELEVANCE . AS THE COURT HELD IN ITS JUDGMENTS OF 29 OCTOBER 1980 IN CASES 209 TO 215 AND 218/78 ( VAN LANDEWYCK V COMMISSION ( 1980 ) ECR 3125 ), THE COMMISSION CANNOT BE DESCRIBED AS A ' ' TRIBUNAL ' ' WITHIN THE MEANING OF ARTICLE 6 OF THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS .*

*8 IT SHOULD HOWEVER BE ADDED , AS THE COURT HELD IN THE AFOREMENTIONED JUDGMENT , THAT DURING THE ADMINISTRATIVE PROCEDURE BEFORE THE COMMISSION , THE COMMISSION IS BOUND TO OBSERVE THE PROCEDURAL SAFEGUARDS PROVIDED FOR BY COMMUNITY LAW .*

*9 THUS ARTICLE 19 ( 1 ) OF REGULATION NO 17 OF THE COUNCIL OF 6 FEBRUARY 1962 ( OFFICIAL JOURNAL , ENGLISH SPECIAL EDITION 1959-62 P . 87 ) REQUIRES THE COMMISSION , BEFORE TAKING A DECISION , TO GIVE THE PARTIES CONCERNED THE OPPORTUNITY OF BEING HEARD ON THE MATTERS TO WHICH THE COMMISSION HAS TAKEN OBJECTION AND THE COMMISSION , IN ITS REGULATION NO 99/63 OF 25 JULY 1963 ON THE HEARINGS PROVIDED FOR IN ARTICLE 19 ( 1 ) AND ( 2 ) OF COUNCIL REGULATION NO 17 ( OFFICIAL JOURNAL , ENGLISH SPECIAL EDITION 1963-64 , P . 47 ), INSTITUTED A PROCEDURE OF AN ADVERSARY NATURE . UNDER THAT PROCEDURE THE COMMISSION MUST NOTIFY ITS OBJECTIONS TO THE UNDERTAKINGS CONCERNED , WHICH MAY THEN REPLY IN WRITING WITHIN A STATED PERIOD . WHERE APPROPRIATE , AND PARTICULARLY IN CASES WHERE THE COMMISSION PROPOSES TO IMPOSE FINES , THE UNDERTAKINGS MAY BE AFFORDED AN ORAL HEARING . UNDER THE TERMS OF ARTICLE 4 OF REGULATION NO 99/63 THE COMMISSION MAY , IN ITS DECISIONS , DEAL ONLY WITH THOSE OBJECTIONS RAISED AGAINST UNDERTAKINGS IN RESPECT OF WHICH THEY HAVE BEEN AFFORDED THE OPPORTUNITY OF MAKING KNOWN THEIR VIEWS .*

*10 AS THE COURT RECALLED IN ITS JUDGMENT OF 13 FEBRUARY 1979 IN CASE 85/76 ( HOFFMANN-LA ROCHE V COMMISSION ( 1979 ) ECR 461 ), THE ABOVEMENTIONED PROVISIONS ARE AN APPLICATION OF THE FUNDAMENTAL PRINCIPLE OF COMMUNITY LAW WHICH REQUIRES THE RIGHT TO A FAIR HEARING TO BE OBSERVED IN ALL PROCEEDINGS , EVEN THOSE OF AN ADMINISTRATIVE NATURE , AND LAYS DOWN IN PARTICULAR THAT THE UNDERTAKING CONCERNED MUST HAVE BEEN AFFORDED THE OPPORTUNITY , DURING THE ADMINISTRATIVE PROCEDURE , TO MAKE KNOWN ITS VIEWS ON THE TRUTH AND RELEVANCE OF THE FACTS AND CIRCUMSTANCES*

*ALLEGED AND ON THE DOCUMENTS USED BY THE COMMISSION TO SUPPORT ITS CLAIM THAT THERE HAS BEEN AN INFRINGEMENT OF THE TREATY .*

*11 IT FOLLOWS THAT , ALTHOUGH THE GENERAL SUBMISSION PUT FORWARD BY MDF MUST BE REJECTED AS BEING BASED ON A MISUNDERSTANDING OF THE NATURE OF THE PROCEDURE BEFORE THE COMMISSION , COMMUNITY LAW CONTAINS ALL THE MEANS NECESSARY FOR EXAMINING AND , IN AN APPROPRIATE CASE , UPHOLDING THE FOLLOWING SUBMISSIONS BASED ON ALLEGED BREACHES OF THE APPLICANTS ' RIGHT TO A FAIR HEARING .*

*( B ) THE FAILURE TO DISCLOSE IN THE STATEMENT OF OBJECTIONS CERTAIN MATTERS MENTIONED IN THE DECISION*

*12 FIRST , THE APPLICANTS CLAIM THAT THE COMMISSION , IN ARTICLES 1 AND 2 OF ITS DECISION , FOUND THAT THE TWO CONCERTED PRACTICES HAD BEGUN AT THE END OF 1975 , THAT THE CONCERTED PRACTICE BETWEEN MDF , PIONEER AND MELCHERS HAD CEASED IN FEBRUARY 1976 AND THE CONCERTED PRACTICE BETWEEN MDF AND SHRIRO HAD CONTINUED UNTIL THE END OF 1977 , WHEREAS , IN ITS STATEMENT OF OBJECTIONS , THE COMMISSION WAS PROPOSING TO FIND THAT THE TWO INFRINGEMENTS HAD ONLY SUBSISTED DURING THE PERIOD ' ' LATE JANUARY/EARLY FEBRUARY 1976 ' ' .*

*13 THE COMMISSION MAINTAINS THAT IT WAS ON THE BASIS OF THE INFORMATION CONTAINED IN THE REPLIES TO THE STATEMENT OF OBJECTIONS AND THE REPLIES GIVEN DURING THE HEARING THAT IT CONCLUDED , IN ITS DECISION , THAT THE INFRINGEMENTS WERE OF LONGER DURATION THAN IT HAD CONSIDERED WHEN DRAWING UP THE STATEMENT OF OBJECTIONS .*

*14 IT IS CLEAR FROM PREVIOUS DECISIONS OF THE COURT THAT THE STATEMENT OF OBJECTIONS MUST SET FORTH CLEARLY ALL THE ESSENTIAL FACTS UPON WHICH THE COMMISSION IS RELYING AT THAT STAGE OF THE PROCEDURE . THAT MAY BE DONE SUMMARILY AND THE DECISION IS NOT NECESSARILY REQUIRED TO BE A REPLICA OF THE COMMISSION ' S STATEMENT OF OBJECTIONS . THE COMMISSION MUST TAKE INTO ACCOUNT THE FACTORS EMERGING FROM THE ADMINISTRATIVE PROCEDURE IN ORDER EITHER TO ABANDON SUCH OBJECTIONS AS HAVE BEEN SHOWN TO BE UNFOUNDED OR TO AMEND AND SUPPLEMENT ITS ARGUMENTS , BOTH IN FACT AND IN LAW , IN SUPPORT OF THE OBJECTIONS WHICH IT MAINTAINS , PROVIDED HOWEVER THAT IT RELIES ONLY ON FACTS ON WHICH THE PARTIES CONCERNED HAVE HAD AN OPPORTUNITY TO MAKE KNOWN THEIR VIEWS AND PROVIDED THAT , IN THE COURSE OF THE ADMINISTRATIVE PROCEDURE , IT HAS MADE AVAILABLE TO THE UNDERTAKINGS CONCERNED THE INFORMATION NECESSARY FOR THEIR DEFENCE .*

*15 SINCE , IN ACCORDANCE WITH THE LAST SUBPARAGRAPH OF ARTICLE 15 ( 2 ) OF REGULATION NO 17 , THE DURATION OF THE INFRINGEMENT IS ONE OF THE FACTORS TO BE TAKEN INTO CONSIDERATION WHEN FIXING THE FINE , IT IS CLEAR FROM THOSE DECISIONS OF THE COURT THAT THE COMMISSION , PARTICULARLY WHEN IT PROPOSES TO IMPOSE FINES , MUST STATE , AS AN ESSENTIAL FACTOR , THE DURATION ESTABLISHED BY IT ON THE BASIS OF THE INFORMATION AVAILABLE TO IT AT THE TIME WHEN IT FORMULATES THE STATEMENT OF OBJECTIONS . THE COMMISSION MAY EXTEND THE PERIOD THUS STATED IF SUPPLEMENTARY INFORMATION OBTAINED DURING THE ADMINISTRATIVE PROCEDURE SO JUSTIFIES , PROVIDED THAT THE UNDERTAKINGS HAVE HAD AN OPPORTUNITY TO MAKE THEIR VIEWS KNOWN IN THAT RESPECT .*

*16 IN THE PRESENT CASES IT IS NOT DISPUTED THAT THE COMMISSION DID NOT INDICATE TO THE APPLICANTS ITS INTENTION TO ESTABLISH THE EXISTENCE OF INFRINGEMENTS OF A LONGER DURATION THAN WAS MENTIONED IN THE STATEMENT OF OBJECTIONS AND THAT THE UNDERTAKINGS HAD NO OPPORTUNITY OF MAKING KNOWN THEIR VIEWS AS REGARDS PERIODS WHICH WERE NOT MENTIONED THEREIN .*

*17 IN THOSE CIRCUMSTANCES , IN ASSESSING THE DURATION OF THE INFRINGEMENTS FOUND BY THE CONTESTED DECISION , REGARD MUST BE HAD ONLY TO THE PERIOD ' ' LATE JANUARY/EARLY FEBRUARY 1976 ' ' .*

*18 SECONDLY , THE APPLICANTS CLAIM THAT THE CONTESTED DECISION MENTIONS CERTAIN FACTS WHICH WERE NOT MENTIONED IN THE STATEMENT OF OBJECTIONS . IN PARTICULAR , PIONEER AND PIONEER GB REFER TO THE ACCOUNT GIVEN IN THE TWO DOCUMENTS OF THE MEETING WHICH WAS HELD AT PIONEER ' S HEADQUARTERS IN ANTWERP ON 19 AND 20 JANUARY . ONLY IN THE DECISION ( PARAGRAPHS ( 52 ) AND ( 62 )) DID THE COMMISSION MENTION THAT THERE WAS NO WRITTEN TRACE OF THAT MEETING , FROM WHICH IT INFERRED THAT ITS PURPOSE WAS , IN PART AT LEAST , TO DISCUSS PARALLEL IMPORTS .*

*19 AS REGARDS THE MEETING IN ANTWERP , THE STATEMENT OF OBJECTIONS ITSELF INDICATES THAT ONE OF THE ESSENTIAL POINTS OF THAT MEETING WAS THE DISCUSSION OF PARALLEL IMPORTS INTO FRANCE AND IT SETS OUT ALL THE INFORMATION OBTAINED BY THE COMMISSION ON THAT MATTER FROM THE PARTICIPANTS . MOREOVER , IT APPEARS FROM THE TRANSCRIPT OF THE HEARING BEFORE THE COMMISSION THAT THE PURPOSE OF THE MEETING WAS THE SUBJECT OF THOROUGH DISCUSSION ON THAT OCCASION . IT FOLLOWS THAT THE APPLICANTS HAD EVERY POSSIBILITY OF MAKING THEIR VIEWS KNOWN AND OF ADDUCING EVIDENCE IN THAT REGARD .*

*THE SAME FINDING MUST BE MADE AS REGARDS THE OTHER FACTS MENTIONED BY THE APPLICANTS AND THAT PART OF THE SUBMISSION MUST THEREFORE BE REJECTED .*

*20 FINALLY , THE APPLICANTS CLAIM THAT THE COMMISSION INFRINGED THEIR RIGHT TO A FAIR HEARING BY NOT STATING , DURING THE ADMINISTRATIVE PROCEDURE , IF NECESSARY IN A SUPPLEMENTARY STATEMENT OF OBJECTIONS , THE CRITERIA ON THE BASIS OF WHICH IT WAS PROPOSING TO CALCULATE THE FINE , NOT TO MENTION THE AMOUNT OR EVEN THE APPROXIMATE SIZE OF IT . THAT INFRINGEMENT IS SAID TO BE ALL THE MORE SERIOUS IN THE PRESENT CASE SINCE THE FINES IMPOSED WERE CONSIDERABLY HIGHER THAN THOSE IMPOSED IN THE PAST AND SINCE THEY WERE CALCULATED BY APPLYING A FORMULA LINKED TO THE TURNOVER OF THE UNDERTAKINGS IN QUESTION . MOREOVER , PIONEER CLAIMS THAT IT WAS NOT OPEN TO THE COMMISSION TO IMPOSE ON IT A FINE BASED ON THE ASSUMPTION THAT THE INFRINGEMENT WAS INTENTIONAL WHEN , IN THE STATEMENT OF OBJECTIONS , IT DID NOT DESCRIBE PIONEER ' S CONDUCT IN THAT WAY .*

*21 THAT PART OF THE SUBMISSION CANNOT BE UPHELD EITHER . IN ITS STATEMENT OF OBJECTIONS , THE COMMISSION EXPRESSLY STATED THAT IT WOULD CONSIDER WHETHER IT WAS APPROPRIATE TO IMPOSE FINES ON THE UNDERTAKINGS AND IT ALSO INDICATED THE MAIN FACTUAL AND LEGAL CRITERIA CAPABLE OF ATTRACTING A FINE , SUCH AS THE GRAVITY AND THE DURATION OF THE ALLEGED INFRINGEMENT AND WHETHER THAT INFRINGEMENT WAS COMMITTED ' ' INTENTIONALLY OR NEGLIGENTLY ' ' . IN DOING SO THE COMMISSION FULFILLED ITS OBLIGATIONS ON THIS POINT INASMUCH AS IT GAVE THE UNDERTAKINGS THE NECESSARY DETAILS TO ENABLE THEM TO DEFEND THEMSELVES NOT MERELY AGAINST THE FINDING OF AN INFRINGEMENT BUT ALSO AGAINST THE IMPOSITION OF FINES . TO GIVE INDICATIONS AS REGARDS THE LEVEL OF THE FINES ENVISAGED , BEFORE THE UNDERTAKINGS HAVE BEEN INVITED TO SUBMIT THEIR OBSERVATIONS ON THE ALLEGATIONS AGAINST THEM , WOULD BE TO ANTICIPATE THE COMMISSION ' S DECISION AND WOULD THUS BE INAPPROPRIATE .*

*22 NOR WAS THE COMMISSION BOUND TO MENTION , IN THE STATEMENT OF OBJECTIONS , THE POSSIBILITY OF A CHANGE IN ITS POLICY AS REGARDS THE GENERAL LEVEL OF FINES , A POSSIBILITY WHICH DEPENDED ON GENERAL CONSIDERATIONS OF COMPETITION POLICY HAVING NO DIRECT RELATIONSHIP WITH THE PARTICULAR CIRCUMSTANCES OF THESE CASES .*

*23 FINALLY , AS REGARDS TURNOVER , BY REQUESTING THE UNDERTAKINGS TO SUPPLY IT WITH INFORMATION CONCERNING THEIR TURNOVER DURING THE LAST FINANCIAL YEAR , THE COMMISSION GAVE THE UNDERTAKINGS THE OPPORTUNITY OF MAKING THEIR VIEWS KNOWN ON THAT POINT AND OF ADDING ANY FURTHER INFORMATION WHICH THEY CONSIDERED TO BE USEFUL IN THAT RESPECT .*

*( C ) THE FAILURE TO DISCLOSE DOCUMENTS*

*24 FIRST , PIONEER AND PIONEER GB MAINTAIN THAT , DESPITE THEIR REQUESTS TO THAT EFFECT , THE COMMISSION DID NOT TRANSMIT TO THEM , IN DUE TIME , THE DOCUMENTS ON WHICH IT BASED ITS FINDINGS AS REGARDS THE EFFECTS OF THE LETTERS SENT BY MR TODD OF SHRIRO TO THE DIRECTORS OF COMET AND AUDIOTRONIC .*

*25 ON THAT POINT THE COMMISSION ASSERTS , IN PARAGRAPH ( 50 ) OF ITS DECISION , THAT IT WAS ESTABLISHED THAT , AS A RESULT OF SHRIRO ' S INTERVENTION , COMET CEASED TO EXPORT PIONEER EQUIPMENT FOR RESALE . ACCORDING TO THE DECISION , AUDIOTRONIC REPLACED COMET IN SUPPLYING ONE OF ITS CUSTOMERS , EURO-ELECTRO IN BRUSSELS ; IN MARCH 1976 AUDIOTRONIC RECEIVED LARGE ORDERS BUT WAS ABLE TO CARRY OUT ONLY A PART OF THEM OWING TO DIFFICULTIES CAUSED BY SHRIRO .*

*26 SINCE THE PERIOD TO BE TAKEN INTO CONSIDERATION IN ASSESSING THE DURATION OF THE INFRINGEMENTS MUST , AS HAS BEEN STATED ABOVE , BE CONFINED TO LATE JANUARY AND EARLY FEBRUARY 1976 AND SINCE THE COMMISSION ' S FINDINGS RELATING TO THE EFFECTS ON AUDIOTRONIC ' S EXPORTS RELATE SPECIFICALLY TO A LATER PERIOD , THE COURT ' S EXAMINATION OF THIS PART OF THE SUBMISSION MAY BE RESTRICTED TO COMET ' S SITUATION .*

*27 AS FAR AS THE LATTER UNDERTAKING IS CONCERNED , THE COMMISSION RELIED ESSENTIALLY ON A WRITTEN STATEMENT BY MR MASON , A DIRECTOR OF COMET , AND ON THE REPORTS OF ITS INSPECTORS ON VISITS TO COMET AND EURO-ELECTRO AND ON ACCOUNTING DOCUMENTS RELATING TO COMET .*

*28 MR MASON ' S STATEMENT WAS COMMUNICATED TO THE APPLICANTS BY THE COMMISSION ON 9 OCTOBER 1978 , BUT ONLY IN PART . THE COMMISSION REFUSED TO DIVULGE THE PERTINENT POINTS OF THE STATEMENT , INVOKING THEIR CONFIDENTIAL NATURE , WHICH DID NOT HOWEVER PREVENT MR MASON HIMSELF FROM SENDING TO THE APPLICANTS , AT THEIR REQUEST , A COMPLETE COPY OF THE STATEMENT .*

*29 ALTHOUGH , AS A RESULT OF THEIR OWN DILIGENCE , THE APPLICANTS THUS GAINED KNOWLEDGE OF THE WHOLE OF THE STATEMENT MADE BY MR MASON JUST BEFORE THE HEARING , IT IS NOT DISPUTED THAT THEY WERE NOT ACQUAINTED OR WERE ONLY PARTIALLY ACQUAINTED WITH THE OTHER DOCUMENTS MENTIONED ABOVE BEFORE THE COMMISSION ADOPTED ITS*

*DECISION . THEREFORE THEY DID NOT HAVE THE OPPORTUNITY , IN DUE TIME , OF MAKING KNOWN THEIR VIEWS ON THE CONTENTS AND THE SCOPE OF THOSE DOCUMENTS OR OF OBTAINING AND PUTTING FORWARD , WHERE APPROPRIATE , EVIDENCE TO THE CONTRARY . IT FOLLOWS THAT THE COMMISSION WAS WRONG TO BASE ITS DECISION ON THE CONTENTS OF THOSE DOCUMENTS .*

*30 SINCE THE FINDINGS WHICH THE COMMISSION BASED ON THOSE DOCUMENTS , WHICH DID NOT COME TO THE APPLICANTS ' NOTICE , RELATE TO MATTERS WHICH ARE OF PURELY SECONDARY IMPORTANCE IN RELATION TO THE INFRINGEMENTS FOUND TO HAVE BEEN COMMITTED IN ARTICLES 1 AND 2 OF THE DECISION , THAT BREACH OF THE RIGHT TO A FAIR HEARING CANNOT AFFECT THE VALIDITY OF THE WHOLE OF THE DECISION . INSTEAD , IT IS APPROPRIATE FOR THE COURT TO DISREGARD THE CONTENTS OF THOSE DOCUMENTS WHEN CONSIDERING THE SUBSTANTIVE VALIDITY OF THE DECISION .*

*31 SECONDLY , MDF , PIONEER AND PIONEER GB MAINTAIN THAT THEY DID NOT HAVE NOTICE OF THE REPORT BY MACKINTOSH CONSULTANTS COMPANY LIMITED , LONDON , ON WHICH THE COMMISSION RELIED IN PARAGRAPH ( 25 ) OF THE DECISION FOR THE PURPOSE OF DETERMINING THE HI-FI MARKETS IN FRANCE , THE UNITED KINGDOM AND THE FEDERAL REPUBLIC OF GERMANY . THEY EMPHASIZE IN PARTICULAR THAT KNOWLEDGE OF THE DEFINITION OF HI-FI EQUIPMENT ON WHICH THAT REPORT BASED ITS ESTIMATES WAS INDISPENSABLE FOR THE APPLICANTS ' DEFENCE AS REGARDS THEIR MARKET SHARES AS STATED BY THE COMMISSION IN ITS DECISION .*

*32 IN THE STATEMENT OF OBJECTIONS THE COMMISSION STATED THAT THE MARKET SHARE OF PIONEER PRODUCTS FOR 1976 WAS AT LEAST 7 TO 10% IN FRANCE AND 8 TO 9% IN THE UNITED KINGDOM . MDF AND PIONEER GB DISPUTED THOSE FIGURES IN THEIR REPLIES TO THE STATEMENT OF OBJECTIONS . THE COMMISSION THEN INSTRUCTED MACKINTOSH CONSULTANTS COMPANY LIMITED TO DRAW UP A REPORT ON THE VOLUME OF THE HI-FI MARKETS IN THE MEMBER STATES IN QUESTION . ON THE BASIS OF THAT REPORT AND THE TURNOVER OF THE TWO APPLICANTS IN PIONEER PRODUCTS , THE COMMISSION EVALUATED THE SHARE OF THE FRENCH HI-FI MARKET HELD BY PIONEER PRODUCTS IN 1976 AT 11.5% AND THE SHARE OF THE UNITED KINGDOM MARKET AT 10.5% .*

*33 HOWEVER , IN PARAGRAPH ( 25 ) OF ITS DECISION , THE COMMISSION ADHERED TO THE FIGURES WHICH IT HAD GIVEN IN THE STATEMENT OF OBJECTIONS . IT DID NOT THEREFORE BASE ITS DECISION ON THE VOLUME OF THOSE MARKETS AS ESTIMATED IN THE REPORT . THAT REPORT WAS REQUESTED SOLELY IN ORDER TO VERIFY THE COMMISSION ' S INITIAL ESTIMATES , ON WHICH THE APPLICANTS HAD CAST DOUBTS DURING THE ADMINISTRATIVE PROCEDURE . THAT PART OF THE SUBMISSION CANNOT THEREFORE BE ACCEPTED .*

*( D ) THE NON-DISCLOSURE OF THE OPINION OF THE ADVISORY COMMITTEE*

*34 MDF AND PIONEER ARGUE THAT ARTICLE 10 ( 6 ) OF REGULATION NO 17 , WHICH STATES THAT THE OPINION OF THE ADVISORY COMMITTEE SHALL NOT BE MADE PUBLIC , SHOULD BE CONSTRUED IN SUCH A WAY AS TO ALLOW THE OPINION TO BE DISCLOSED CONFIDENTIALLY TO ' ' THE UNDERTAKINGS DIRECTLY CONCERNED ' ' . IT IS ARGUED THAT IF SUCH A CONSTRUCTION IS NOT ACCEPTED THE AFORESAID PROVISION IS INVALID BECAUSE IT OFFENDS AGAINST THE PRINCIPLE OF THE RIGHT TO A FAIR HEARING .*

*35 ARTICLE 10 ( 6 ) OF REGULATION NO 17 CANNOT BE CONSTRUED IN THE WAY SUGGESTED BY THE APPLICANTS . IT IS CLEAR FROM THAT ARTICLE THAT THE CONSULTATION OF THE ADVISORY COMMITTEE REPRESENTS THE FINAL STAGE OF THE PROCEDURE BEFORE THE ADOPTION OF THE DECISION AND THE OPINION IS GIVEN ON THE BASIS OF A DRAFT OF THE DECISION . TO GIVE THE UNDERTAKINGS THE OPPORTUNITY OF MAKING THEIR VIEWS KNOWN ON THAT OPINION AND , THEREFORE , ON THE DRAFT DECISION WOULD AMOUNT TO REOPENING THE PREVIOUS STAGE OF THE PROCEDURE , WHICH WOULD BE CONTRARY TO THE SYSTEM INTENDED BY THE REGULATION .*

*36 THE FAILURE TO DISCLOSE THE OPINION IS NOT CONTRARY TO THE PRINCIPLE OF THE RIGHT TO A FAIR HEARING . AS WAS REITERATED ABOVE , THAT PRINCIPLE MEANS THAT THE COMMISSION MUST , DURING THE ADMINISTRATIVE PROCEDURE , DIVULGE TO THE UNDERTAKINGS IN QUESTION ALL THE FACTS , CIRCUMSTANCES OR DOCUMENTS ON WHICH IT RELIES , SO AS TO ENABLE THEM USEFULLY TO MAKE KNOWN THEIR VIEWS ON THE TRUTH AND RELEVANCE OF THE FACTS AND CIRCUMSTANCES ALLEGED AND ON THE DOCUMENTS USED BY THE COMMISSION TO SUPPORT ITS ALLEGATIONS . WHATEVER MAY BE THE COMMITTEE ' S OPINION , THE COMMISSION MAY BASE ITS DECISION ONLY ON FACTS ON WHICH THE UNDERTAKINGS HAVE HAD THE OPPORTUNITY OF MAKING KNOWN THEIR VIEWS . CONSEQUENTLY , THIS SUBMISSION MUST BE REJECTED .*

*B - THE ASSESSMENT AND CLASSIFICATION OF THE FACTS ON THE BASIS OF WHICH THE COMMISSION FOUND THAT THERE HAD BEEN INFRINGEMENTS OF ARTICLE 85 ( 1 )*

*( A ) MELCHERS ' ALLEGED REFUSAL TO SELL*

*37 IT IS CLEAR FROM THE EVIDENCE BEFORE THE COURT THAT IN NOVEMBER 1975 SHOPS BELONGING TO THE PURCHASING GROUP OF WHICH MR IFFLI WAS THE GENERAL MANAGER WERE IN A POSITION TO OFFER FOR SALE PIONEER EQUIPMENT FROM BELGIUM AT PRICES 26 TO 31%*

*LOWER THAN THE RETAIL PRICES PREVAILING IN FRANCE . IN ORDER TO FIND AN ALTERNATIVE SOURCE FOR PIONEER PRODUCTS INTER ALIA , MR IFFLI APPLIED TO GRUONER THROUGH THE INTERMEDIARY OF MR WEBER , THE MANAGER OF THE UNDERTAKING WILLI JUNG , SAARBRUCKEN , WHICH AT THAT TIME HAD BECOME A BRANCH OF GRUONER .*

*38 FOLLOWING A DISCUSSION WITH MR IFFLI ON 12 DECEMBER 1975 AT GRUONER ' S HEAD OFFICE IN ROMMELSHAUSEN , THE CHIEF BUYER FOR THAT COMPANY , MR SCHREIBER , SENT A TELEX MESSAGE TO MELCHERS , AMONGST OTHERS , ON 15 DECEMBER 1975 REQUESTING IT TO SEND PRICE LISTS . MELCHERS REFERRED HIM TO ITS LOCAL REPRESENTATIVE , WHO VISITED GRUONER . ON THE BASIS OF THE INFORMATION THUS OBTAINED , INCLUDING THE LATEST PRICE LIST FOR 1975 , MR SCHREIBER , ON 31 DECEMBER 1975 SENT AN OFFER TO MR IFFLI FOR EQUIPMENT , INCLUDING PIONEER EQUIPMENT , AT PRICES UP TO 30% BELOW THOSE QUOTED BY MDF AT THAT TIME .*

*39 ON 12 AND 14 JANUARY 1976 , MR IFFLI PLACED TWO ORDERS WITH MR WEBER FOR A TOTAL VALUE OF APPROXIMATELY DM 1 000 000 . MR WEBER IMMEDIATELY FORWARDED THOSE ORDERS TO GRUONER BUT IT WAS NOT UNTIL 20 JANUARY 1976 , THAT IS TO SAY THE DAY ON WHICH MR WEBER ASSURED MR IFFLI THAT PART OF THE GOODS WERE ALREADY ON THEIR WAY TO ROMMELSHAUSEN , THAT MR SCHREIBER ORDERED BY TELEX FROM MELCHERS GOODS CORRESPONDING TO THE ORDERS PLACED BY MR IFFLI BUT HAVING A VALUE OF ONLY DM 550 000 . ACCORDING TO MR SCHREIBER ' S EXPLANATIONS HE HAD IN THE MEANTIME HAD FRESH DISCUSSIONS WITH THE LOCAL REPRESENTATIVE OF MELCHERS AND HAD OBTAINED A NEW PRICE LIST APPLICABLE AS FROM FEBRUARY 1976 .*

*40 ON 21 AND 22 JANUARY 1976 MR IFFLI OBTAINED THE NECESSARY IMPORT LICENCES FROM THE FRENCH AUTHORITIES . ON THE SAME DATES , MELCHERS , FOR ITS PART , CHECKED ITS STOCKS IN RELATION TO GRUONER ' S ORDER AND OBTAINED AN UNDERTAKING FROM AN INSURANCE COMPANY THAT IT WAS PREPARED TO COVER GRUONER ' S ORDER FOR DM 200 000 . ON 23 JANUARY 1976 , IN REPLY TO A FURTHER TELEX MESSAGE FROM MR SCHREIBER , MELCHERS CONFIRMED THE ORDER AND GAVE THE NAME OF THE CARRIER WHO WAS TO DELIVER THE GOODS . ACCORDING TO MELCHERS ' EXPLANATIONS , THAT TELEX MESSAGE WAS SENT IN ERROR .*

*41 ON 28 JANUARY 1976 MR SCHREIBER SENT A TELEX MESSAGE IN GERMAN TO MR WEBER INFORMING HIM THAT THE FOLLOWING HAD TRANSPIRED FROM A TELEPHONE CONVERSATION WITH MELCHERS ' SALES MANAGER :*

*' ' PIONEER ' S EUROPEAN HEAD OFFICE IN ANTWERP ALREADY KNOWS THAT A LICENCE HAS BEEN ISSUED TO IMPORT PIONEER EQUIPMENT . THE GERMAN REPRESENTATIVE WAS INSTRUCTED NOT TO SUPPLY JUNG UNDER ANY CIRCUMSTANCES . WE CAN BE SUPPLIED ONLY IF WE UNDERTAKE NOT TO EXPORT . ' '*

*42 MR IFFLI , HAVING BEEN INFORMED BY MR WEBER , COMPLAINED TO MR WEBER AND TO GRUONER . BY A TELEX MESSAGE DATED 6 FEBRUARY 1976 , MR WEBER INFORMED GRUONER THAT HE COULD PROVE THAT PIONEER EQUIPMENT SOLD BY MELCHERS HAD PREVIOUSLY BEEN IMPORTED INTO FRANCE , PARTLY THROUGH THE INTERMEDIARY OF A WHOLESALER IN BRUSSELS AND PARTLY BY THE UNDERTAKING EVB OF STUTTGART . THE ORIGINAL TELEX MESSAGE BEARS HANDWRITTEN NOTES BY MR SCHREIBER WHICH STATE , REGARDING THE DELIVERY VIA BRUSSELS : ' ' DID NOT ITSELF DELIVER , IS KNOWN AT BREMEN . BUT NOT VIA GERMANY , MELCHERS DENIES IT ABSOLUTELY ' ' . AS REGARDS THE DELIVERY BY EVB , THE NOTES STATE : ' ' RIGHT , IT WAS IN NOVEMBER 1975 , ENORMOUS TROUBLE SO CAREFUL NOW ' ' .*

*43 ON 11 FEBRUARY 1976 A MEETING TOOK PLACE AT ROMMELSHAUSEN BETWEEN GRUONER AND THE DIRECTORS OF MELCHERS ' HI-FI DIVISION . BEFORE THE COURT , THE PARTICIPANTS IN THAT MEETING DENIED THAT THE SUBJECT OF EXPORTS TO FRANCE WAS BROACHED ON THAT OCCASION .*

*44 IN A TELEX MESSAGE DATED 18 FEBRUARY 1976 , MR SCHREIBER , REFERRING TO ' ' THE MEETING WITH THE MANAGEMENT OF MELCHERS ' ' , GAVE MR WEBER INFORMATION IDENTICAL TO THAT CONTAINED IN HIS HANDWRITTEN NOTES ON THE TELEX MESSAGE OF 6 FEBRUARY . THE TELEX MESSAGE OF 18 FEBRUARY CONTINUES AS FOLLOWS :*

*' ' 3 . WE ARE VERY INTERESTED IN INCLUDING PIONEER EQUIPMENT IN OUR SALES PROGRAMME . WE CANNOT MAKE DELIVERIES IN SUFFICIENT QUANTITIES UNLESS MELCHERS HAS AN ASSURANCE THAT WE SUPPLY THE EQUIPMENT DELIVERED TO THE GERMAN RETAIL TRADE .*

*4.THERE CAN BE NO TALK OF COMMERCIAL PRESSURE AND THAT FACTOR CANNOT UNFORTUNATELY BE CHANGED OVERNIGHT . ULTIMATELY , IT IS DECISIVE FOR EUROPEAN SALES TO MAINTAIN THE LEVEL OF PRICES . ' '*

*45 IN A MEMORANDUM DATED 19 FEBRUARY 1976 REGARDING THE MEETING IN ROMMELSHAUSEN ON 11 FEBRUARY , MR SCHREIBER STATED , INTER ALIA , THAT ' ' FOLLOWING TALKS WITH C . MELCHERS AND CO . . . . ANY OBSTACLES TO COOPERATION BETWEEN US HAVE NOW BEEN REMOVED . ' '*

*46 ON 20 FEBRUARY 1976 MR SCHREIBER SENT A TELEX MESSAGE TO MR IFFLI INFORMING HIM*

*THAT THE PRICES WHICH HAD BEEN QUOTED TO HIM ON 31 DECEMBER 1975 FOR PIONEER EQUIPMENT AND OTHER PRODUCTS WERE NO LONGER VALID ' ' ON ACCOUNT OF PRICE DEVELOPMENTS ' ' . THUS , MR IFFLI ' S ORDER WAS DEFINITIVELY ABANDONED .*

*47 IN THE CONTESTED DECISION THE COMMISSION DRAWS THE CONCLUSION THAT THE REFUSAL TO CARRY OUT MR IFFLI ' S ORDER WAS DUE TO THE FACT THAT MELCHERS HAD REQUIRED AN ASSURANCE FROM GRUONER THAT THE GOODS WOULD NOT BE EXPORTED . APART FROM THE FACTS SET OUT ABOVE , IT RELIES ON A WRITTEN STATEMENT OF 18 MAY 1977 IN WHICH MR SCHREIBER CONFIRMED THE EVENTS WHICH HE HAD DESCRIBED IN HIS TELEX MESSAGES TO MR WEBER AND STATED THAT , AT THE MEETING IN ROMMELSHAUSEN , THE MANAGEMENT OF MELCHERS HAD REPEATED THAT MELCHERS COULD DELIVER ONLY TO THE SPECIALIST TRADE IN GERMANY .*

*48 FOR ITS PART , MELCHERS STATES THAT ITS FAILURE TO PERFORM THE ORDER PLACED BY GRUONER WAS DUE SOLELY TO THE FACT THAT , ON THE ONE HAND , MELCHERS ' STOCK LEVELS DID NOT ENABLE THE GOODS ORDERED TO BE DELIVERED AND THAT , ON THE OTHER HAND , THE ORDER WAS PREMATURE BECAUSE THE DISCUSSIONS BETWEEN MR SCHREIBER AND THE LOCAL REPRESENTATIVE WERE MERELY AN ' ' INITIAL CONTACT ' ' WHICH WAS NOT SUFFICIENT FOR MELCHERS , WHICH WAS ACCUSTOMED TO SELLING ALMOST EXCLUSIVELY TO RETAILERS , TO ESTABLISH BUSINESS RELATIONS WITH GRUONER . IT IS THOSE FACTS , RATHER THAN ANY REFUSAL TO DELIVER GOODS INTENDED FOR EXPORT , WHICH MELCHERS ' STAFF COMMUNICATED TO MR SCHREIBER BEFORE THE LATTER SENT HIS TELEX MESSAGE OF 28 JANUARY 1976 TO MR WEBER .*

*49 AGAIN ACCORDING TO MELCHERS , THE REASON WHY THE GOODS WERE NOT DELIVERED AFTER BUSINESS RELATIONS BETWEEN THE TWO UNDERTAKINGS WERE FINALLY ESTABLISHED AT THE MEETING IN ROMMELSHAUSEN ON 11 FEBRUARY 1976 WAS THAT GRUONER HAD LOST ALL INTEREST IN PERFORMING THE CONTRACT ENTERED INTO WITH MR IFFLI . MR SCHREIBER HAD IN FACT DISCOVERED THAT HE HAD MADE A MISTAKE IN CALCULATING THE PRICES WHICH HE HAD QUOTED TO MR IFFLI ON 31 DECEMBER 1975 . APART FROM THE VARIOUS STANDARD DISCOUNTS MENTIONED BY THE LOCAL REPRESENTATIVE , HE HAD DEDUCTED 11% IN RESPECT OF GERMAN VALUE-ADDED TAX WHEREAS THE BASIC PRICES DID NOT INCLUDE VALUE-ADDED TAX .*

*50 IN THAT REGARD , MELCHERS RELIES ON A MATHEMATICAL FORMULA WRITTEN BY HAND BY MR SCHREIBER ON A PRICE LIST FOR PRODUCTS OTHER THAN PIONEER EQUIPMENT WHICH MELCHERS ' LAWYERS FOUND DURING A VISIT TO GRUONER ' S PREMISES AND ALSO ON A WRITTEN STATEMENT OF 5 SEPTEMBER 1980 IN WHICH MR SCHREIBER ADMITTED HAVING INVENTED THE STORY OF MELCHERS ' REFUSAL TO SELL SO AS TO CONCEAL THE MISTAKE WHICH HE HAD MADE IN HIS CALCULATIONS . THAT STATEMENT WAS CONFIRMED IN ESSENCE BY MR SCHREIBER AT THE HEARING OF WITNESSES BEFORE THE COURT .*

*51 IN VIEW OF THE OPPOSING ARGUMENTS OF THE PARTIES AND THE CONTRADICTORY STATEMENTS OF MR SCHREIBER , IT MUST BE SEEN WHETHER THE OTHER EVIDENCE IS CAPABLE OF CONFIRMING ONE OR OTHER OF THOSE ARGUMENTS .*

*52 AS REGARDS THE COMMISSION ' S ARGUMENT , IT SHOULD BE BORNE IN MIND THAT THE TELEX MESSAGE SENT BY MR SCHREIBER TO MR WEBER ON 28 JANUARY 1976 STATED THAT ' ' PIONEER ' S EUROPEAN HEAD OFFICE IN ANTWERP ALREADY KNOWS THAT A LICENCE HAS BEEN ISSUED TO IMPORT PIONEER EQUIPMENT . ' ' IN FACT IT IS NOT DISPUTED THAT MDF INFORMED PIONEER OF THE LICENCES ISSUED TO MR IFFLI ON 21 AND 22 JANUARY 1976 AND THAT PIONEER FORWARDED THAT INFORMATION TO MELCHERS . IN THOSE CIRCUMSTANCES , THE EXPLANATION GIVEN BY MR SCHREIBER IN HIS STATEMENT OF 5 SEPTEMBER 1980 TO THE EFFECT THAT IT WAS MR IFFLI WHO INFORMED HIM OF THE GRANT OF THE LICENCES IS UNCONVINCING .*

*53 IN THAT CONNECTION , REGARD MUST ALSO BE HAD TO THE SPECIFIC INFORMATION ON EARLIER EXPORTS TO FRANCE WHICH MR SCHREIBER NOTED ON THE TELEX MESSAGE FROM MR WEBER OF 6 FEBRUARY 1976 AND WHICH HE COMMUNICATED TO MR WEBER BY TELEX ON 18 FEBRUARY . THE ACCURACY OF THAT INFORMATION HAS NOT BEEN DISPUTED AND IT COULD ONLY HAVE COME FROM MELCHERS ' EMPLOYEES .*

*54 IT IS THEREFORE EVIDENT THAT THE SUBJECT OF EXPORTS TO FRANCE WAS BROACHED DURING THE DISCUSSIONS BETWEEN MR SCHREIBER AND THE EMPLOYEES OF MELCHERS AND THE INFORMATION SUPPLIED BY THOSE EMPLOYEES IS OF SUCH A NATURE AS TO INDICATE THE EXISTENCE OF A REFUSAL TO SELL GOODS DESTINED FOR THAT COUNTRY .*

*55 AS REGARDS THE APPLICANT ' S ARGUMENT , THE DESCRIPTION OF THE DISCUSSIONS BETWEEN MR SCHREIBER AND THE LOCAL REPRESENTATIVE AS MERELY BEING AN INITIAL CONTACT DOES NOT ACCORD WITH THE NOTES TAKEN BY MR SCHREIBER DURING THOSE TWO DISCUSSIONS . THOSE HANDWRITTEN NOTES , THE CONTENTS OF WHICH WERE EXPLAINED BY MR SCHREIBER BEFORE THE COURT , DESCRIBE IN DETAIL THE CONDITIONS OF SALE AND DELIVERY , INCLUDING THE VARIOUS REBATES AND BONUSES OFFERED TO RETAILERS OF DIFFERENT SIZES AND EVEN TO THE SINGLE WHOLESALER PREVIOUSLY SUPPLIED BY MELCHERS . IT IS POSSIBLE THAT GRUONER , AS A LARGE WHOLESALER , MIGHT HAVE HOPED TO OBTAIN MORE BY PROLONGED NEGOTIATIONS*

*BUT IT IS IMPOSSIBLE TO UNDERSTAND WHY MELCHERS WAS NOT PREPARED TO SUPPLY THE GOODS ORDERED ON TERMS WHICH ACCORDING TO IT WERE THE NORMAL TERMS AT THAT TIME . SAVE FOR THE PERIOD OF PAYMENT , IT IS MOREOVER DIFFICULT TO DETECT ANY DIFFERENCE BETWEEN THE TERMS STATED IN THE HANDWRITTEN NOTES REGARDING THE LAST DISCUSSION WITH THE LOCAL REPRESENTATIVE AND THOSE STATED IN THE MEMORANDUM OF 19 FEBRUARY 1976 REGARDING THE MEETING IN ROMMELSHAUSEN .*

*56 ON THE OTHER HAND , THE DELIVERY DIFFICULTIES PLEADED BY MELCHERS ARE CONFIRMED BY THE NOTES WHICH MELCHERS ' WAREHOUSEMAN WROTE ON THE ORDER TRANSMITTED BY TELEX ON 20 JANUARY 1976 . THOSE NOTES SHOW THAT CERTAIN MODELS ORDERED WERE NOT IN STOCK , THAT THE STOCKS OF OTHER MODELS WERE NOT SUFFICIENT AND THAT , IN ANY EVENT , IT WAS A VERY LARGE ORDER IN RELATION TO STOCK LEVELS AT THAT TIME , JUST AFTER THE CHRISTMAS SALES . HOWEVER , SINCE IT IS NOT DISPUTED THAT MELCHERS COULD HAVE DELIVERED A LARGE PART OF THE GOODS ORDERED AT ONCE WITHOUT REALLY JEOPARDIZING ITS STOCKS AND SINCE MELCHERS HAD SENT A TELEX MESSAGE TO GRUONER WHICH GRUONER COULD JUSTIFIABLY REGARD AS CONSTITUTING AN UNQUALIFIED ACCEPTANCE , THE COURT CANNOT UNDERSTAND WHY MELCHERS MADE NO OFFER TO MAKE PARTIAL DELIVERIES AND DID NOT CONTACT PIONEER CONCERNING THE POSSIBILITY OF OBTAINING THE REST OF THE GOODS ORDERED . THE LEVEL OF STOCKS CANNOT THEREFORE BE ACCEPTED AS AN ADEQUATE EXPLANATION OF THE FAILURE TO PERFORM THE ORDER .*

*57 AS FAR AS THE ALLEGED ERROR RELATING TO VALUE-ADDED TAX IS CONCERNED , IT IS TRUE THAT , IN RESPECT OF MOST OF THE MODELS , THE DISCOUNTS INDICATED BY A FIXED PERCENTAGE IN MR SCHREIBER ' S HANDWRITTEN NOTES DO NOT BY THEMSELVES EXPLAIN THE LOW PRICES OFFERED BY MR SCHREIBER TO MR IFFLI ON 31 DECEMBER 1975 , WHEREAS AN APPLICATION OF THE FORMULA INDICATED BY MELCHERS MAKES IT POSSIBLE , PROVIDED CERTAIN OF THOSE PERCENTAGES ARE INSERTED , TO ARRIVE AT THE EXACT PRICES OFFERED . AS THE COMMISSION HAS EMPHASIZED , THE PRICE LISTS WHICH FORMED THE BASIS OF MR SCHREIBER ' S CALCULATIONS CLEARLY STATED THAT THE PRICES WERE QUOTED EXCLUSIVE OF VALUE-ADDED TAX ; THE METHOD INDICATED BY THE FORMULA IS NOT THE ONE TO BE USED TO DEDUCT VALUE-ADDED TAX AT THE RATE OF 11% AND THE ALLEGED ERROR WAS NOT IN ANY EVENT MADE IN RESPECT OF THE PRICES FOR LOUDSPEAKERS . MOREOVER , WHEN THE WITNESSES WERE HEARD BEFORE THE COURT , MR SCHREIBER WAS UNABLE TO EXPLAIN HOW HE COULD HAVE MADE SUCH AN ERROR AND WAS UNABLE TO DEMONSTRATE HIS CALCULATIONS IN THAT RESPECT . SO , EVEN IF THE PRECISE LEVEL OF MOST OF THE PRICES OFFERED TO MR IFFLI THUS REMAINS UNEXPLAINED , THE EXPLANATION PROPOSED BY MELCHERS CANNOT BE ACCEPTED .*

*58 FINALLY , IT IS IMPOSSIBLE TO DISREGARD THE CHRONOLOGICAL SEQUENCE OF EVENTS OR THE FACT THAT THEY ARE CONTEMPORANEOUS WITH THOSE RELATING TO PARALLEL IMPORTS FROM THE UNITED KINGDOM . GRUONER ' S ORDER WAS IN FACT TREATED IN A PERFECTLY NORMAL MANNER BY MELCHERS UNTIL THE TIME WHEN IT MAY REASONABLY BE SUPPOSED THAT MELCHERS RECEIVED KNOWLEDGE OF THE GRANT OF THE LICENCES TO IFFLI . THAT MOMENT WAS IN THE WEEK FOLLOWING MELCHERS ' PARTICIPATION IN THE MEETING OF 19 AND 20 JANUARY 1976 AT PIONEER ' S HEADQUARTERS IN ANTWERP . AT THAT MEETING MDF COMPLAINED OF PARALLEL IMPORTS INTO FRANCE AND , FOLLOWING THE MEETING , SHRIRO ' S MANAGING DIRECTOR REQUESTED HIS MAIN CUSTOMERS , BY LETTERS OF 28 AND 29 JANUARY 1976 , TO CEASE EXPORTING .*

*59 MOREOVER , THE TELEX MESSAGE WHICH MR SCHREIBER SENT TO MR WEBER ON 18 FEBRUARY 1976 SEEMS TO BE CLOSELY CONNECTED , BY ITS CONTENTS AS MUCH AS BY ITS DATE , WITH THE ROMMELSHAUSEN MEETING OF 11 FEBRUARY AND WITH MR SCHREIBER ' S MEMORANDUM OF 19 FEBRUARY REGARDING THAT MEETING . THE SAME MAY BE SAID OF THE TELEX MESSAGE OF 20 FEBRUARY IN WHICH MR SCHREIBER DEFINITIVELY WITHDREW HIS OFFER TO MR IFFLI . FINALLY , THE KEEN INTEREST IN THE ESTABLISHMENT OF BUSINESS RELATIONS WITH MELCHERS , WHICH IS DEMONSTRATED BY THE TELEX MESSAGE OF 18 FEBRUARY , ACCORDS WITH THE SUBSEQUENT DEVELOPMENT OF THOSE RELATIONS AND SUFFICES TO EXPLAIN GRUONER ' S LACK OF INSISTENCE AS REGARDS THE GOODS INTENDED FOR MR IFFLI . ALTHOUGH THAT CHRONOLOGICAL SEQUENCE IS NOT IN ITSELF DECISIVE , IT NONE THE LESS SUPPORTS THE COMMISSION ' S ARGUMENT .*

*60 THE FOREGOING CONSIDERATIONS SUFFICE FOR A FINDING THAT THE COMMISSION HAS SATISFACTORILY SHOWN THAT MELCHERS REFUSED TO PERFORM GRUONER ' S ORDER ON ACCOUNT OF THE DESTINATION OF THE GOODS , WITHOUT ITS BEING NECESSARY TO COME TO A DECISION ON THE QUESTION OF THE CREDENCE TO BE GIVEN TO THE SUCCESSIVE STATEMENTS BY MR SCHREIBER OR THE QUESTION OF MR SCHREIBER ' S CONDUCT IN TRANSACTIONS INVOLVING HI-FI EQUIPMENT OF OTHER MAKES , WHICH , ACCORDING TO THE APPLICANTS , WAS SIMILAR TO HIS CONDUCT IN THE PRESENT CASE .*

*( B ) THE EFFECTS OF THE LETTERS SENT BY MR TODD*

*61 PIONEER AND PIONEER GB DISPUTE THE FINDINGS IN THE CONTESTED DECISION RELATING TO THE EFFECTS OF THE TWO LETTERS WHICH SHRIRO ' S MANAGING DIRECTOR , MR TODD , SENT ON*

*28 AND 29 JANUARY 1976 TO THE GENERAL MANAGER OF AUDIOTRONIC AND TO THE CHAIRMAN OF COMET . THEY MAINTAIN THAT THOSE LETTERS PRODUCED WHOLLY INSIGNIFICANT EFFECTS .*

*62 IN THAT RESPECT IT SHOULD FIRST BE EMPHASIZED THAT IT IS NOT DISPUTED THAT THOSE LETTERS FOLLOWED INCREASINGLY INSISTENT APPEALS FROM MR SETTON , THE OWNER OF MDF , WHO HAD EVEN MADE SOME TEST PURCHASES WITH AUDIOTRONIC AND COMET , THE RESULTS OF WHICH HE PRODUCED AT THE ANTWERP MEETING ON 19 AND 20 JANUARY 1976 . THE LETTERS CONTAIN UNEQUIVOCAL REQUESTS TO CEASE EXPORTING PIONEER EQUIPMENT . THEY WERE SENT TO THE TWO MAIN CUSTOMERS , WHICH TOGETHER ACCOUNTED FOR SOME 45% OF SALES OF PIONEER EQUIPMENT SUPPLIED BY SHRIRO . IN THOSE CIRCUMSTANCES , THE TWO LETTERS CONSTITUTE , BY THEMSELVES , PROOF OF A CONCERTED PRACTICE BETWEEN MDF AND SHRIRO WHICH HAD AS ITS OBJECT THE RESTRICTION OF COMPETITION WITHIN THE COMMON MARKET . SUBJECT TO THE SHARES HELD BY MDF AND SHRIRO IN THE MARKETS CONCERNED , A QUESTION WHICH IS DEALT WITH BELOW IN SECTION ( E ), THAT PRACTICE WAS ALSO CAPABLE OF AFFECTING TRADE BETWEEN MEMBER STATES . THE SUBMISSION PUT FORWARD BY THE TWO APPLICANTS DOES NOT THEREFORE RELATE TO THE EXISTENCE OF AN INFRINGEMENT OF ARTICLE 85 ( 1 ) OF THE TREATY BUT MERELY TO THE EFFECT OF THAT INFRINGEMENT AND , CONSEQUENTLY , TO ITS GRAVITY .*

*63 AS REGARDS AUDIOTRONIC , THE COMMISSION ADMITS THAT THE LETTER SENT TO THAT UNDERTAKING HAD NO IMMEDIATE EFFECTS . ON THE CONTRARY , ACCORDING TO PARAGRAPH ( 50 ) OF THE CONTESTED DECISION , AUDIOTRONIC EVEN REPLACED COMET IN SUPPLYING EURO-ELECTRO IN BRUSSELS AS SOON AS COMET CEASED EXPORTING PIONEER EQUIPMENT . ACCORDING TO THE COMMISSION , IT WAS ONLY AS FROM MARCH 1976 THAT THE CONCERTED PRACTICE HAD ANY EFFECT AS REGARDS AUDIOTRONIC . SINCE THE SUBMISSIONS RELATING TO PROCEDURAL DEFECTS RESULT IN THE PERIOD TO BE TAKEN INTO CONSIDERATION BEING RESTRICTED TO LATE JANUARY AND EARLY FEBRUARY 1976 , THOSE STATEMENTS ARE IMMATERIAL .*

*64 AS REGARDS COMET , THE COMMISSION , IN ESSENCE , STATES IN PARAGRAPHS ( 41 ), ( 50 ), ( 82 ) AND ( 98 ) OF ITS DECISION , THAT THAT UNDERTAKING EXPORTED LARGE QUANTITIES OF PIONEER EQUIPMENT BEFORE RECEIVING MR TODD ' S LETTER BUT THAT THOSE EXPORTS CEASED FOLLOWING THE LETTER , WHEREAS EXPORTS OF OTHER MAKES CONTINUED .*

*65 THOSE FINDINGS BY THE COMMISSION ARE BASED ON A WRITTEN STATEMENT MADE ON 3 JUNE 1977 BY A DIRECTOR OF COMET , MR MASON , ON THE REPORTS OF ITS INSPECTORS RELATING TO VISITS TO COMET AND EURO-ELECTRO AND ON DOCUMENTS RELATING TO COMET ' S ACCOUNTS . OF THOSE DOCUMENTS , ONLY MR MASON ' S STATEMENT WAS KNOWN TO THE APPLICANTS BEFORE THE ADOPTION OF THE CONTESTED DECISION . AS STATED ABOVE IN PART A ( C ), THE INFORMATION CONTAINED IN THE OTHER DOCUMENTS MUST THEREFORE BE DISREGARDED .*

*66 AT POINT 3 OF HIS STATEMENT , MR MASON DECLARES THAT , IN ABOUT 1974 , COMET COMMENCED AN EXPORT BUSINESS , MAINLY IN HI-FI EQUIPMENT , TO OTHER EEC COUNTRIES . HOWEVER , UNTIL DECEMBER 1975 , THOSE EXPORTS INCLUDED ONLY SMALL AMOUNTS OF PIONEER EQUIPMENT . ON THE OTHER HAND , IN THE PERIOD FROM 19 DECEMBER 1975 TO 16 JANUARY 1976 , THE DATE OF THE LAST CONSIGNMENT , COMET SOLD TO EURO-ELECTRO IN BRUSSELS PIONEER EQUIPMENT WORTH IN TOTAL MORE THAN UKL 33 000 . IN RESPECT OF THE PERIOD PRIOR TO RECEIPT OF MR TODD ' S LETTER , THE STATEMENT THUS SUPPORTS THE FINDINGS OF THE COMMISSION .*

*67 AT POINT 5 MR MASON STATES :*

*' ' ON 30 JANUARY 1976 A LETTER WAS RECEIVED BY THE COMPANY ADDRESSED TO THE CHAIRMAN FROM THE MANAGING DIRECTOR OF SHRIRO ( UK ) LTD . THE COMPANY WAS ANXIOUS TO PRESERVE ITS GOOD RELATIONS WITH SHRIRO AND TO BE ABLE TO CONTINUE OBTAINING SATISFACTORY SUPPLIES . A PLACATORY LETTER WAS THEREFORE SENT TO SHRIRO . FOLLOWING THIS CORRESPONDENCE THE MATTER HAS BEEN DISCUSSED WITH SHRIRO , BUT NOTHING ADDITIONAL TO WHAT IS SET OUT IN THE LETTER OF 30 JANUARY 1976 HAS BEEN SAID . . . . SINCE JANUARY 1976 WE HAVE RECEIVED VARIOUS REQUESTS FOR PIONEER EQUIPMENT FROM ABROAD , BUT BECAUSE OF THE COMBINED EFFECTS OF CREDIT LIMITS ON OUR CUSTOMERS AND AVAILABLE MARGINS , WE HAVE SO FAR ONLY BEEN ABLE TO MEET THESE REQUESTS TO A VERY LIMITED EXTENT , THOUGH THE COMPANY HAS NOW MADE IT CLEAR TO SHRIRO ( UK ) LTD IT MUST BE FREE TO TRADE IN ACCORDANCE WITH EEC LAWS . ' '*

*68 THE APPLICANTS MAINTAIN THAT , ALTHOUGH THAT STATEMENT IN FACT CONFIRMS THAT NO LARGE QUANTITIES OF PIONEER EQUIPMENT WERE EXPORTED AFTER RECEIPT OF MR TODD ' S LETTER , IT INDICATES ON THE OTHER HAND THAT THAT WAS DUE NOT TO THE LETTER BUT TO CIRCUMSTANCES OF A COMMERCIAL NATURE .*

*69 IN THAT REGARD IT MUST HOWEVER BE REMEMBERED THAT AT THE PERIOD IN QUESTION COMET , FAR FROM STATING THAT IT MUST BE ABLE TO TRADE FREELY , STATED IN REPLY TO MR TODD ' S LETTER THAT IT ' ' WILL NOT DELIBERATELY EXPORT PIONEER PRODUCTS TO TRADE CUSTOMERS OUTSIDE THE UNITED KINGDOM ' ' . IT FOLLOWS THAT THE LAST SENTENCE OF MR*

*MASON ' S STATEMENT RELATES TO A PERIOD WHICH , IN ANY EVENT , IS LATER THAN THE PERIOD ' ' LATE JANUARY/EARLY FEBRUARY 1976 ' ' .*

*70 ON THAT POINT IT MUST THEREFORE BE CONCLUDED THAT THE COMMISSION WAS ENTITLED TO FIND THAT COMET HAD EXPORTED LARGE QUANTITIES OF PIONEER EQUIPMENT BEFORE RECEIVING MR TODD ' S LETTER BUT THAT THOSE EXPORTS CEASED FOLLOWING THAT LETTER .*

*( C ) THE DURATION OF THE CONCERTED PRACTICES*

*71 REGARD BEING HAD TO THE CONSIDERATIONS SET FORTH ABOVE AS REGARDS THE PERIOD TO BE TAKEN INTO CONSIDERATION FOR DETERMINING THE DURATION OF THE INFRINGEMENTS , IT IS NO LONGER NECESSARY TO EXAMINE THIS SUBMISSION , WHICH DOES NOT RELATE TO THAT PERIOD .*

*( D ) PIONEER ' S PARTICIPATION IN THE CONCERTED PRACTICES*

*72 IN THE CONTESTED DECISION THE COMMISSION FOUND THAT PIONEER HAD PARTICIPATED BOTH IN THE CONCERTED PRACTICE BETWEEN MELCHERS AND MDF AND IN THE CONCERTED PRACTICE BETWEEN MDF AND SHRIRO . IT BASED THAT FINDING , IN PARTICULAR , ON PIONEER ' S GENERAL POSITION WITH REGARD TO NATIONAL DISTRIBUTORS , ON THE COURSE AND RESULTS OF THE MEETING IN ANTWERP ON 19 AND 20 JANUARY 1976 AND ON THE TRANSMISSION BY PIONEER TO MELCHERS OF COMPLAINTS AND INFORMATION FROM MDF RELATING TO PARALLEL IMPORTS .*

*73 PIONEER DISPUTES THAT ITS CONDUCT MAY BE DESCRIBED IN SUCH A WAY . IT MAINTAINS THAT IT WAS IN NO POSITION TO HAVE ANY CONTROL OVER THE CONDUCT OF SHRIRO OR MELCHERS . THE PURPOSE OF THE ANTWERP MEETING WAS NOT TO DISCUSS PARALLEL IMPORTS . ON THAT OCCASION , AS ON MANY OTHERS , PIONEER ' S REPRESENTATIVES MERELY LISTENED TO THE COMPLAINTS MADE BY MR SETTON OF MDF AND ADVISED HIM TO LOWER HIS PRICES . THE FORWARDING OF INFORMATION ON PARALLEL IMPORTS MERELY FORMS PART OF THE NORMAL EXCHANGE OF INFORMATION BETWEEN SUPPLIER AND DISTRIBUTOR CONCERNING THE MARKET SITUATION .*

*74 IN THIS REGARD , IT SHOULD BE REMEMBERED THAT THE PURPOSE OF PIONEER , WHICH IS A WHOLLY-OWNED SUBSIDIARY OF THE PARENT COMPANY IN JAPAN , IS TO IMPORT PIONEER EQUIPMENT INTO EUROPE AND TO ORGANIZE SALES OF SUCH EQUIPMENT . TO THAT END , IT ATTEMPTS TO FIND A DISTRIBUTOR IN EACH OF THE MEMBER STATES IN QUESTION , OFFERS IT AN EXCLUSIVE DISTRIBUTORSHIP AGREEMENT , DIVIDES THE PRODUCTS IMPORTED AMONGST THE NATIONAL DISTRIBUTORS AND SEEKS TO COORDINATE THEIR SALES EFFORTS , INTER ALIA BY HOLDING REGULAR MEETINGS .*

*75 EVEN IF THOSE ACTIVITIES DO NOT NECESSARILY CONFER ON PIONEER A DECISIVE INFLUENCE ON THE CONDUCT OF EACH OF THE DISTRIBUTORS , THAT DOES NOT ALTER THE FACT THAT , ON ACCOUNT OF ITS CENTRAL POSITION , IT WAS OBLIGED TO DISPLAY PARTICULAR VIGILANCE IN ORDER TO PREVENT CONCERTED EFFORTS OF THAT KIND FROM GIVING RISE TO PRACTICES CONTRARY TO THE COMPETITION RULES .*

*76 AS FAR AS MELCHERS ' CONDUCT IS CONCERNED , IT IS NOT DISPUTED THAT PIONEER FORWARDED TO THAT DISTRIBUTOR NOT MERELY MR SETTON ' S COMPLAINTS BUT ALSO INFORMATION CONCERNING THE IMPORT LICENCES OBTAINED BY MR IFFLI FROM THE FRENCH AUTHORITIES . IN THOSE CIRCUMSTANCES SUCH A COMMUNICATION APPEARS TO HAVE BEEN AN IMPLIED INCITEMENT TO MELCHERS TO TRY TO DISCOVER THE SOURCE OF THOSE IMPORTS AND TO PUT A STOP TO THEM .*

*77 AS REGARDS THE ANTWERP MEETING THERE IS NO WRITTEN RECORD OF IT EXCEPT THE LETTERS SENT BY MR TODD OF SHRIRO TO ITS TWO MAIN CUSTOMERS AND THOSE TAKING PART IN THE MEETING WERE UNABLE TO GIVE A CONSISTENT EXPLANATION OF ITS PURPOSE .*

*78 IN HIS LETTERS OF 28 AND 29 JANUARY 1976 , MR TODD EXPLAINED TO HIS TWO CUSTOMERS THAT HE WAS CALLED TO ANTWERP TO DISCUSS COMPLAINTS BY THE FRENCH DISTRIBUTOR AGAINST PARALLEL IMPORTS ; HE EXPLAINED HOW HE WAS CONFRONTED WITH THE RESULTS OF THE TEST PURCHASES MADE BY MDF WITH THE TWO CUSTOMERS AND HE REGRETTED THAT THEY ' ' HAVE CAUSED MY PRINCIPALS TO LOOK ON ME WITH A CERTAIN AMOUNT OF DISFAVOUR ' ' . EVEN IF SUCH LANGUAGE MAY , AS MR TODD MAINTAINED DURING THE ADMINISTRATIVE PROCEDURE , HAVE BEEN EXAGGERATED TO A CERTAIN EXTENT IN ORDER TO IMPRESS HIS CUSTOMERS , IT ACCORDS WITH OTHER FACTORS WHICH TEND TO PROVE THAT PARALLEL IMPORTS CONSTITUTED AN IMPORTANT SUBJECT OF DISCUSSION AT THE MEETING .*

*79 THUS IT IS NOT DISPUTED THAT MR SETTON DID INDEED BRING TO THE MEETING THE RESULTS OF THREE TEST PURCHASES WHICH UNDERTAKINGS MANAGED BY HIM HAD MADE FROM BRITISH CUSTOMERS OF SHRIRO AND THAT HE INSISTED ON THE NEED TO PUT A STOP TO PARALLEL IMPORTS TO FRANCE . MOREOVER , IT IS NOT DISPUTED THAT MR TODD ' S LETTERS TO HIS CUSTOMERS WERE A DIRECT CONSEQUENCE OF THAT MEETING AND NOT OF LATER CONTACTS WITH MR SETTON . IN THOSE CIRCUMSTANCES , PIONEER , WHICH HAD CALLED THE MEETING AND PRESIDED OVER IT , MUST ACCEPT RESPONSIBILITY FOR THAT CONSEQUENCE , REGARD BEING HAD*

*TO THE POSITION WHICH IT OCCUPIES IN RELATION TO ITS NATIONAL DISTRIBUTORS , AS DESCRIBED ABOVE .*

*80 IT MUST THEREFORE BE CONCLUDED THAT THE COMMISSION WAS JUSTIFIED IN FINDING THAT PIONEER HAD PARTICIPATED IN TWO CONCERTED PRACTICES .*

*( E ) THE MARKET SHARES HELD BY THE APPLICANTS AND THE EFFECT ON TRADE BETWEEN MEMBER STATES*

*81 IN PARAGRAPH ( 3 ) OF ITS DECISION , THE COMMISSION ESTIMATES THE TOTAL VALUE OF HI-FI PRODUCTS SOLD BY PIONEER TO ITS DISTRIBUTORS IN THE THREE MEMBER STATES CONCERNED DURING THE FINANCIAL YEAR 1975/76 AT BFR 735 000 000 . FURTHERMORE , IT STATES IN PARAGRAPH ( 25 ) THAT IN 1976 MDF ' S TURNOVER IN PIONEER PRODUCTS WAS FF 77 000 000 , SHRIRO ' S WAS UKL 7 300 000 AND MELCHERS ' WAS DM 19 000 000 . ON THE BASIS OF AN ESTIMATE OF THE HI-FI MARKETS IN THE THREE MEMBER STATES IT ARRIVES AT THE CONCLUSION THAT THE SHARE OF THE MARKET HELD BY PIONEER PRODUCTS IN 1976 WAS AT LEAST 7 TO 10% IN FRANCE , 8 TO 9% IN THE UNITED KINGDOM AND APPROXIMATELY 2% IN THE FEDERAL REPUBLIC OF GERMANY . IT FINDS IN PARAGRAPHS ( 75 ) AND ( 82 ) THAT THOSE MARKET SHARES WERE SUFFICIENTLY LARGE FOR THE BEHAVIOUR OF THE UNDERTAKINGS TO BE , IN PRINCIPLE , CAPABLE OF APPRECIABLY AFFECTING TRADE BETWEEN MEMBER STATES .*

*82 MDF AND PIONEER GB DISPUTE THOSE CALCULATIONS . ON THE ONE HAND , THE COMMISSION INCLUDED , IN THE TURNOVER FIGURES STATED , PRODUCTS OTHER THAN PIONEER HI-FI EQUIPMENT ; ON THE OTHER HAND , IT DEFINED THE HI-FI MARKET TOO NARROWLY . THE TWO APPLICANTS CONSIDER THAT THEIR MARKET SHARES IN 1976 WERE 3.38% IN FRANCE AND 3.18% IN THE UNITED KINGDOM . THEY MAINTAIN THAT SUCH MARKET SHARES ARE NOT SUFFICIENT FOR THEIR CONDUCT TO BE REGARDED AS CAPABLE OF AFFECTING TRADE BETWEEN MEMBER STATES WITHIN THE MEANING OF ARTICLE 85 ( 1 ) OF THE TREATY .*

*83 IT CANNOT BE DENIED THAT THERE IS NO GENERALLY RECOGNIZED DEFINITION OF THE TERM ' ' HI-FI PRODUCTS ' ' AND THE DIFFERENT MARKET STUDIES ON WHICH THE PARTIES RELY VARY CONSIDERABLY IN THIS RESPECT . IT SEEMS THAT NONE OF THOSE STUDIES CORRESPONDS EXACTLY TO THE TYPES OF PRODUCTS ENVISAGED BY THE PARTIES WHEN THEY STATED THE TURNOVER OF THE TWO UNDERTAKINGS . HOWEVER , AN EXAMINATION OF THOSE QUESTIONS OF FACT , WHICH ARE HIGHLY TECHNICAL AND DIFFICULT , MAY BE SUPERFLUOUS IF THE MARKET SHARES INDICATED BY THE APPLICANTS ARE THEMSELVES SUFFICIENT FOR THE PURPOSES OF ARTICLE 85 ( 1 ).*

*84 IN THAT CONNECTION IT SHOULD BE REMEMBERED THAT , AS THE COURT HAS HELD IN SEVERAL JUDGMENTS , INCLUDING THAT OF 9 JULY 1969 IN CASE 5/69 ( VOLK V VERVAECKE ( 1969 ) ECR 295 ), IF AN AGREEMENT IS TO BE CAPABLE OF AFFECTING TRADE BETWEEN MEMBER STATES , IT MUST BE POSSIBLE TO FORESEE WITH A SUFFICIENT DEGREE OF PROBABILITY , ON THE BASIS OF A SET OF OBJECTIVE FACTORS OF LAW OR FACT , THAT THE AGREEMENT IN QUESTION MAY HAVE AN INFLUENCE , DIRECT OR INDIRECT , ACTUAL OR POTENTIAL , ON THE PATTERN OF TRADE BETWEEN MEMBER STATES IN SUCH A WAY THAT IT MIGHT HINDER THE ATTAINMENT OF THE OBJECTIVES OF A SINGLE MARKET BETWEEN STATES . THE SAME CRITERION MUST BE APPLIED AS REGARDS THE CONCERTED PRACTICES IN ISSUE IN THIS CASE .*

*85 IN THE SAME JUDGMENT THE COURT ACKNOWLEDGED THAT AN EXCLUSIVE DEALING AGREEMENT , EVEN WITH ABSOLUTE TERRITORIAL PROTECTION , MAY ESCAPE THE PROHIBITION LAID DOWN IN ARTICLE 85 WHERE IT AFFECTS THE MARKET ONLY INSIGNIFICANTLY , REGARD BEING HAD TO THE WEAK POSITION OF THE PERSONS CONCERNED ON THE MARKET IN THE PRODUCTS IN QUESTION .*

*86 THAT IS NOT THE POSITION OF THE APPLICANTS IN THE PRESENT CASE . THE STUDIES PRODUCED BY MDF AND PIONEER GB SHOW THAT THE MARKET IN HI-FI PRODUCTS IN FRANCE AND THE UNITED KINGDOM IS VERY LARGE BUT THAT IT IS MARKEDLY DIVIDED BETWEEN A VERY GREAT NUMBER OF BRANDS , SO THAT THE PERCENTAGES STATED BY THE APPLICANTS EXCEED THOSE OF MOST OF THEIR COMPETITORS . IF REGARD IS HAD SOLELY TO IMPORTED BRANDS , IT EVEN SEEMS THAT THE TWO APPLICANTS WERE AMONGST THE LARGEST SUPPLIERS OF THE TWO MARKETS . IN THOSE CIRCUMSTANCES , REGARD BEING HAD TO THEIR ABSOLUTE TURNOVER FIGURES , IT CANNOT BE DENIED THAT CONDUCT BY THOSE UNDERTAKINGS SEEKING TO RESTRAIN PARALLEL IMPORTS AND THEREFORE TO PARTITION NATIONAL MARKETS WAS CAPABLE OF EXERCISING AN INFLUENCE ON THE PATTERN OF TRADE BETWEEN MEMBER STATES IN A WAY CAPABLE OF HINDERING THE ATTAINMENT OF THE OBJECTIVES OF A SINGLE MARKET .*

*87 IT MUST THEREFORE BE CONCLUDED THAT THE COMMISSION WAS JUSTIFIED IN FINDING THAT THE APPLICANTS ' CONDUCT WAS CAPABLE OF APPRECIABLY AFFECTING TRADE BETWEEN MEMBER STATES .*

*C - SUBMISSIONS BASED ON A FAILURE TO TAKE INTO ACCOUNT CIRCUMSTANCES PRECLUDING THE IMPOSITION OF FINES*

*( A ) LEGITIMATE SELF-PROTECTION AND NECESSITY*

*88 MDF MAINTAINS THAT , IF IT DID COMMIT AN INFRINGEMENT , IT WAS JUSTIFIED IN SO DOING BY NECESSITY . THE SITUATION IN WHICH IT FOUND ITSELF JUSTIFIED IT IN RESORTING TO LEGITIMATE SELF-PROTECTION AGAINST THE UNFAIR COMPETITION WHICH IT WAS SUFFERING FROM PARALLEL IMPORTERS .*

*89 AS REGARDS THE SUBMISSION BASED ON LEGITIMATE SELF-PROTECTION , IT MUST BE POINTED OUT THAT , AS THE COURT HELD IN ITS JUDGMENTS OF 25 NOVEMBER 1971 IN CASE 22/71 ( BEGUELIN ( 1971 ) ECR 949 ) AND OF 22 JANUARY 1981 IN CASE 58/80 ( DANSK SUPERMARKED ( 1981 ) ECR 181 ), THE MERE FACT OF THE IMPORTATION OF GOODS WHICH HAVE BEEN LAWFULLY MARKETED IN ANOTHER MEMBER STATE CANNOT BE CONSIDERED AN UNFAIR COMMERCIAL PRACTICE . PARALLEL IMPORTS FROM OTHER MEMBER STATES CANNOT THEREFORE , BY THEMSELVES , GIVE RISE TO A SITUATION OF LEGITIMATE SELF-PROTECTION .*

*90 IT IS NOT NECESSARY TO EXAMINE THE POSSIBLE CONSEQUENCES OF A STATE OF NECESSITY , IT BEING SUFFICIENT TO STATE THAT THE APPLICANT HAS NOT DEMONSTRATED THE EXISTENCE OF SUCH A SITUATION . MDF HAS NOT PROVED THAT ITS EXISTENCE WAS THREATENED OR THAT ITS ALLEGED FINANCIAL DIFFICULTIES WERE DUE TO PARALLEL IMPORTS OR , A FORTIORI , THAT AN INFRINGEMENT OF ARTICLE 85 ( 1 ) WAS THE ONLY MEANS OF ENSURING ITS SURVIAL .*

*91 IT FOLLOWS THAT THOSE SUBMISSIONS MUST BE REJECTED .*

*( B ) ARTICLE 85 ( 3 ) OF THE TREATY*

*92 MDF CLAIMS THAT THE SUBSTANTIVE CONDITIONS FOR AN EXEMPTION UNDER ARTICLE 85 ( 3 ) WERE SATISFIED AND THAT THEREFORE IT COULD HAVE OBTAINED AN EXEMPTION BY MEANS OF NOTIFICATION . THE INFRINGEMENT THEREFORE CONSISTED NOT IN A BREACH OF ONE OF THE PRINCIPAL OBJECTS OF THE TREATY BUT MERELY IN A BREACH OF A PROCEDURAL RULE , NAMELY THE FAILURE TO SATISFY THE REQUIREMENTS OF NOTIFICATION AND OBTAINING A FORMAL EXEMPTION .*

*93 THAT SUBMISSION CANNOT BE UPHELD . NOTIFICATION IS NOT A FORMALITY IMPOSED ON UNDERTAKINGS BUT AN INDISPENSABLE CONDITION FOR OBTAINING CERTAIN BENEFITS . UNDER THE TERMS OF ARTICLE 15 ( 5 ) ( A ) OF REGULATION NO 17 NO FINE MAY BE IMPOSED IN RESPECT OF ACTS TAKING PLACE AFTER NOTIFICATION , PROVIDED THEY FALL WITHIN THE LIMITS OF THE ACTIVITY DESCRIBED IN THE NOTIFICATION . THAT ADVANTAGE ENJOYED BY AN UNDERTAKING WHICH NOTIFIES AN AGREEMENT OR A CONCERTED PRACTICE IS THE COUNTERPART OF THE RISK INCURRED BY THE UNDERTAKING IN ITSELF REPORTING THE AGREEMENT OR CONCERTED PRACTICE . THAT UNDERTAKING IN FACT TAKES THE RISK NOT ONLY OF HAVING THE AGREEMENT OR PRACTICE FOUND TO BE IN BREACH OF ARTICLE 85 ( 1 ) AND OF HAVING THE APPLICATION OF SUBPARAGRAPH ( 3 ) REFUSED BUT ALSO OF BEING PUNISHED BY A FINE FOR ACTS PRIOR TO NOTIFICATION . A FORTIORI , AN UNDERTAKING WHICH DID NOT WISH TO RUN THAT RISK CANNOT CLAIM , ON BEING FINED FOR AN INFRINGEMENT IN RESPECT OF AN AGREEMENT WHICH WAS NOT NOTIFIED , THAT THERE WAS A HYPOTHETICAL POSSIBILITY THAT NOTIFICATION MIGHT HAVE LED TO AN EXEMPTION .*

*( C ) CONFORMITY OF MELCHERS ' CONDUCT WITH ITS CONTRACTUAL OBLIGATIONS NOTIFIED TO THE COMMISSION*

*94 MELCHERS CONSIDERS THAT THE FINE IMPOSED ON IT IS IN BREACH OF ARTICLE 15 ( 5 ) OF REGULATION NO 17 INASMUCH AS IT PUNISHES CONDUCT WHICH IS IN CONFORMITY WITH ITS DISTRIBUTION AGREEMENT WITH PIONEER , WHICH WAS NOTIFIED TO THE COMMISSION . MELCHERS COULD NOT HAVE SUPPLIED THE GOODS ORDERED BY GRUONER WITHOUT BEING IN BREACH OF THE OBLIGATION CONTAINED IN THAT AGREEMENT TO ENSURE THAT THE GERMAN MARKET REMAINED PROPERLY SUPPLIED .*

*95 IN REJECTING THAT SUBMISSION IT IS SUFFICIENT TO REFER TO THE APPRAISAL MADE BY THE COURT , IN PART B ( A ) ABOVE , OF MELCHERS ' STOCK LEVELS AT THE MATERIAL TIME AND OF THE ABSENCE OF ANY ATTEMPT ON ITS PART TO OBTAIN THE NECESSARY GOODS .*

*( D ) THE ABSENCE OF INSTRUCTIONS FROM THE PARTNERS*

*96 IN MELCHERS ' VIEW , AN UNDERTAKING MAY NOT BE FINED UNLESS IT IS ESTABLISHED THAT THE INFRINGEMENT IS ATTRIBUTABLE TO THE UNDERTAKING ITSELF , THAT IS TO SAY , IN THE PRESENT CASE , TO THE GENERAL PARTNERS IN MELCHERS . IT IS ARGUED THAT THE COMMISSION HAS NOT SHOWN THAT THE PARTNERS INTENDED TO COMMIT THE ALLEGED INFRINGEMENT OR THAT THEY ACTED NEGLIGENTLY .*

*97 IT MUST BE EMPHASIZED , IN THAT RESPECT , THAT ARTICLE 15 ( 1 ) AND ( 2 ) OF REGULATION NO 17 EMPOWERS THE COMMISSION TO IMPOSE ON UNDERTAKINGS OR ASSOCIATIONS OF UNDERTAKINGS FINES WHERE , INTENTIONALLY OR NEGLIGENTLY , THEY HAVE BEEN GUILTY OF INFRINGEMENTS . FOR THAT PROVISION TO APPLY IT IS NOT NECESSARY FOR THERE TO HAVE BEEN ACTION BY , OR EVEN KNOWLEDGE ON THE PART OF , THE PARTNERS OR PRINCIPAL MANAGERS OF THE UNDERTAKING CONCERNED ; ACTION BY A PERSON WHO IS AUTHORIZED TO ACT ON BEHALF OF THE UNDERTAKING SUFFICES .*

*98 THE APPLICANT HAS NOT SHOWN THAT THE MANAGERS OF THE HI-FI DIVISION OF MELCHERS EXCEEDED THE POWERS WHICH THE PARTNERS CONFERRED ON THEM BY EMPLOYING THEM IN THOSE POSTS . AS FAR AS THE LOCAL REPRESENTATIVE IS CONCERNED , THE APPLICANT EVEN MAINTAINED THAT HE ALWAYS ACTED IN HIS RELATIONS WITH GRUONER IN ACCORDANCE WITH THE DIRECT INSTRUCTIONS OF THOSE MANAGERS . THIS SUBMISSION MUST THEREFORE BE REJECTED .*

*( E ) THE COMMISSION ' S JOINT RESPONSIBILITY IN THESE CASES*

*99 MELCHERS MAINTAINS THAT THE COMMISSION AUTHORIZED THE FRENCH REPUBLIC , UNDER ARTICLE 115 OF THE TREATY , TO EXCLUDE FROM COMMUNITY TREATMENT CERTAIN HI-FI PRODUCTS ORIGINATING IN JAPAN AND PLACED IN FREE CIRCULATION IN OTHER MEMBER STATES . THAT IS SAID TO CONSTITUTE A FACTOR JUSTIFYING THE CANCELLATION OF THE FINE OR , AT LEAST , A SUBSTANTIAL REDUCTION IN THE AMOUNT THEREOF .*

*100 IN THIS CONNECTION THE COMMISSION RIGHTLY POINTS OUT THAT RESTRICTIONS IMPOSED BY PUBLIC AUTHORITIES CANNOT JUSTIFY THE IMPLEMENTATION , BY PRIVATE PERSONS , OF CONCERTED PRACTICES INTENDED TO RESTRICT COMPETITION . THE SUBMISSION MUST THEREFORE BE REJECTED .*

*D - SUBMISSIONS RELATING TO THE SIZE OF THE FINES*

*( A ) THE GENERAL LEVEL OF THE FINES*

*101 THE APPLICANTS MAINTAIN THAT , IN FIXING THE AMOUNTS OF THE FINES , THE COMMISSION FAILED TO OBSERVE THE LAST SUBPARAGRAPH OF ARTICLE 15 ( 2 ) OF REGULATION NO 17 , WHICH PROVIDES THAT REGARD SHALL BE HAD BOTH TO THE GRAVITY AND TO THE DURATION OF THE INFRINGEMENT . ACCORDING TO THE APPLICANTS , THE COMMISSION DID NOT BASE ITSELF ON THE GRAVITY OF THEIR CONDUCT NOR ON ITS DURATION . THEY SAY THAT IT TOOK ADVANTAGE OF THESE CASES IN ORDER TO INTRODUCE A NEW POLICY INTENDED TO INCREASE THE GENERAL LEVEL OF FINES FOR CERTAIN INFRINGEMENTS OF COMMUNITY LAW ALTHOUGH SUCH A CHANGE IN POLICY WAS JUSTIFIED NEITHER BY THE NATURE OF THE INFRINGEMENTS IN QUESTION NOR BY THE PARTICULAR CIRCUMSTANCES OF THE CASE . THE IMPOSITION OF SUCH LARGE FINES IN THE PRESENT CASES IS SOLELY DUE TO THE FACT THAT THE CASES CAME BEFORE THE COMMISSION AT A TIME WHEN IT WAS CHANGING ITS POLICY , WHICH IS NOT ONLY CONTRARY TO THE PROVISIONS OF THE REGULATIONS BUT IN FACT LEADS TO ARBITRARINESS .*

*102 MOREOVER , THE METHOD THUS DESCRIBED IS MANIFESTLY DISCRIMINATORY . THE FACTS OF THE PRESENT CASES AROSE AT THE SAME TIME AS THOSE OF OTHER CASES IN WHICH THE COMMISSION ADOPTED A DECISION BEFORE THE DECISION IN THE PRESENT CASE , IMPOSING SIGNIFICANTLY LOWER FINES .*

*103 THE COMMISSION ADMITS THAT THE PRESENT CASES ARE THE FIRST IN WHICH IT HAS IMPOSED A LEVEL OF FINES CONSIDERABLY HIGHER THAN IN THE PAST . BEFORE THE ADOPTION OF THE CONTESTED DECISION IT HAD NOT IMPOSED FINES EXCEEDING 2% OF THE TOTAL TURNOVER OF THE UNDERTAKING , EVEN FOR SERIOUS INFRINGEMENTS . IN THESE CASES THE FINES RANGE FROM 2 TO 4% OF TURNOVER .*

*104 ACCORDING TO THE COMMISSION , HOWEVER , SUCH A LEVEL IS FULLY JUSTIFIED BY THE NATURE OF THE INFRINGEMENTS . AFTER 20 YEARS OF COMMUNITY COMPETITION POLICY AN APPRECIABLE INCREASE IN THE LEVEL OF FINES IS NECESSARY , IN ITS VIEW , AT LEAST FOR TYPES OF INFRINGEMENT WHICH HAVE LONG BEEN WELL DEFINED AND ARE KNOWN TO THOSE CONCERNED , SUCH AS PROHIBITIONS ON EXPORTS AND IMPORTS . IN FACT THOSE CONSTITUTE THE MOST SERIOUS INFRINGEMENTS SINCE THEY DEPRIVE CONSUMERS OF ALL THE BENEFITS RESULTING FROM THE ELIMINATION OF CUSTOMS DUTIES AND QUANTITATIVE RESTRICTIONS ; THEY HINDER THE INTEGRATION OF THE ECONOMIES OF THE MEMBER STATES AND LEAVE DISTRIBUTORS AND RETAILERS IN A POSITION OF SUBORDINATION TOWARDS PRODUCERS . HEAVIER FINES ARE PARTICULARLY NECESSARY WHERE , AS IN THE PRESENT CASE , THE PRINCIPAL AIM OF THE INFRINGEMENT IS TO MAINTAIN A HIGHER LEVEL OF PRICES FOR CONSUMERS . THE COMMISSION STATES THAT MANY UNDERTAKINGS CARRY ON CONDUCT WHICH THEY KNOW TO BE CONTRARY TO COMMUNITY LAW BECAUSE THE PROFIT WHICH THEY DERIVE FROM THEIR UNLAWFUL CONDUCT EXCEEDS THE FINES IMPOSED HITHERTO . CONDUCT OF THAT KIND CAN ONLY BE DETERRED BY FINES WHICH ARE HEAVIER THAN IN THE PAST .*

*105 IN THAT CONNECTION IT MUST BE REMEMBERED THAT THE COMMISSION ' S POWER TO IMPOSE FINES ON UNDERTAKINGS WHICH , INTENTIONALLY OR NEGLIGENTLY , COMMIT AN INFRINGEMENT OF THE PROVISIONS OF ARTICLES 85 ( 1 ) OR 86 OF THE TREATY IS ONE OF THE MEANS CONFERRED ON THE COMMISSION IN ORDER TO ENABLE IT TO CARRY OUT THE TASK OF SUPERVISION CONFERRED ON IT BY COMMUNITY LAW . THAT TASK CERTAINLY INCLUDES THE DUTY TO INVESTIGATE AND PUNISH INDIVIDUAL INFRINGEMENTS , BUT IT ALSO ENCOMPASSES THE DUTY TO PURSUE A GENERAL POLICY DESIGNED TO APPLY , IN COMPETITION MATTERS , THE PRINCIPLES LAID DOWN BY THE TREATY AND TO GUIDE THE CONDUCT OF UNDERTAKINGS IN THE LIGHT OF THOSE PRINCIPLES .*

*106 IT FOLLOWS THAT , IN ASSESSING THE GRAVITY OF AN INFRINGEMENT FOR THE PURPOSE OF FIXING THE AMOUNT OF THE FINE , THE COMMISSION MUST TAKE INTO CONSIDERATION NOT ONLY THE PARTICULAR CIRCUMSTANCES OF THE CASE BUT ALSO THE CONTEXT IN WHICH THE INFRINGEMENT OCCURS AND MUST ENSURE THAT ITS ACTION HAS THE NECESSARY DETERRENT EFFECT , ESPECIALLY AS REGARDS THOSE TYPES OF INFRINGEMENT WHICH ARE PARTICULARLY HARMFUL TO THE ATTAINMENT OF THE OBJECTIVES OF THE COMMUNITY .*

*107 FROM THAT POINT OF VIEW , THE COMMISSION WAS RIGHT TO CLASSIFY AS VERY SERIOUS INFRINGEMENTS PROHIBITIONS ON EXPORTS AND IMPORTS SEEKING ARTIFICIALLY TO MAINTAIN PRICE DIFFERENCES BETWEEN THE MARKETS OF THE VARIOUS MEMBER STATES . SUCH PROHIBITIONS JEOPARDIZE THE FREEDOM OF INTRA-COMMUNITY TRADE , WHICH IS A FUNDAMENTAL PRINCIPLE OF THE TREATY , AND THEY PREVENT THE ATTAINMENT OF ONE OF ITS OBJECTIVES , NAMELY THE CREATION OF A SINGLE MARKET .*

*108 IT WAS ALSO OPEN TO THE COMMISSION TO HAVE REGARD TO THE FACT THAT PRACTICES OF THIS NATURE , ALTHOUGH THEY WERE ESTABLISHED AS BEING UNLAWFUL AT THE OUTSET OF COMMUNITY COMPETITION POLICY , ARE STILL RELATIVELY FREQUENT ON ACCOUNT OF THE PROFIT THAT CERTAIN OF THE UNDERTAKINGS CONCERNED ARE ABLE TO DERIVE FROM THEM AND , CONSEQUENTLY , IT WAS OPEN TO THE COMMISSION TO CONSIDER THAT IT WAS APPROPRIATE TO RAISE THE LEVEL OF FINES SO AS TO REINFORCE THEIR DETERRENT EFFECT .*

*GROUNDS CONTINUED UNDER DOC.NUM : 680J0100.1109 FOR THE SAME REASONS , THE FACT THAT THE COMMISSION , IN THE PAST , IMPOSED FINES OF A CERTAIN LEVEL FOR CERTAIN TYPES OF INFRINGEMENT DOES NOT MEAN THAT IT IS ESTOPPED FROM RAISING THAT LEVEL WITHIN THE LIMITS INDICATED IN REGULATION NO 17 IF THAT IS NECESSARY TO ENSURE THE IMPLEMENTATION OF COMMUNITY COMPETITION POLICY . ON THE CONTRARY , THE PROPER APPLICATION OF THE COMMUNITY COMPETITION RULES REQUIRES THAT THE COMMISSION MAY AT ANY TIME ADJUST THE LEVEL OF FINES TO THE NEEDS OF THAT POLICY .*

*110 THE SUBMISSION MUST THEREFORE BE REJECTED .*

*( B ) THE ALLEGED ABSENCE OF INTENTION ON THE PART OF PIONEER*

*111 PIONEER ARGUES THAT IT DID NOT ACT INTENTIONALLY SINCE IT COULD NOT KNOW THAT ITS CONDUCT WAS UNLAWFUL .*

*112 ON THE BASIS OF THE ASSESSMENT , CARRIED OUT ABOVE IN PART B ( D ), OF THE EVIDENCE ADDUCED AS REGARDS PIONEER ' S CONDUCT , THE COURT FINDS THAT PIONEER MUST HAVE BEEN FULLY AWARE THAT ITS CONDUCT WAS OF SUCH A NATURE AS TO ENCOURAGE RESTRICTIONS ON COMPETITION . THAT IS SUFFICIENT FOR A FINDING THAT THAT UNDERTAKING ACTED INTENTIONALLY . THIS SUBMISSION MUST THEREFORE BE REJECTED .*

*( C ) THE USE OF TURNOVER AS THE BASIS FOR CALCULATING THE FINES*

*113 MELCHERS CLAIMS THAT IT IS UNLAWFUL TO FIX THE FINES IN PROPORTION TO THE UNDERTAKING ' S TURNOVER , AS THE COMMISSION HAS DONE IN THE PRESENT CASES . IT ARGUES THAT TURNOVER IN FACT GIVES NO INDICATION OF THE PROFITABILITY OF THE UNDERTAKING OR OF ITS ABILITY TO PAY A FINE .*

*114 IN ANY EVENT , MELCHERS , MDF AND PIONEER CLAIM THAT THE FINE CANNOT BE CALCULATED , AS THE COMMISSION HAS DONE IN THE PRESENT CASE , ON THE BASIS OF THE TOTAL TURNOVER OF THE UNDERTAKING , SINCE THE GOODS IN RESPECT OF WHICH THE INFRINGEMENT WAS COMMITTED REPRESENT ONLY A PART OF THAT TURNOVER .*

*115 PIONEER ARGUES THAT THE FINE IMPOSED ON IT MUST BE REDUCED BECAUSE THE TURNOVER ON WHICH THE COMMISSION BASED ITS CALCULATIONS ALSO RELATED TO SALES OF HI-FI EQUIPMENT TO COUNTRIES NOT AFFECTED BY THE INFRINGEMENT .*

*116 ACCORDING TO MELCHERS , THE COMMISSION OUGHT TO HAVE TAKEN INTO CONSIDERATION THE FACT THAT ONLY ABOUT 10% OF ITS TURNOVER RELATED TO HI-FI PRODUCTS , WHILST IN THE CASE OF THE OTHER APPLICANTS THOSE PRODUCTS ACCOUNTED FOR THE WHOLE OF THEIR TURNOVER . MELCHERS ADDS THAT , IN FIXING THE CEILING FOR FINES AT 10% OF THE TURNOVER , ARTICLE 15 ( 2 ) OF REGULATION NO 17 REFERS TO THE TURNOVER IN THE SECTOR IN WHICH THE INFRINGEMENT WAS COMMITTED . BECAUSE THE COMMISSION DID NOT OBSERVE THIS METHOD OF CALCULATION , THE FINE IMPOSED ON MELCHERS AMOUNTS TO 18% OF ITS TURNOVER ON THE HI-FI MARKET , THUS EXCEEDING THE LIMIT FIXED BY THE AFOREMENTIONED PROVISION .*

*117 THE COMMISSION REPLIES THAT ONLY THE TOTAL TURNOVER OF AN UNDERTAKING CAN GIVE AN INDICATION OF THE MAXIMUM FINE WHICH THE UNDERTAKING IS CAPABLE OF PAYING . FOR THAT REASON , THE LIMIT LAID DOWN IN ARTICLE 15 ( 2 ) OF REGULATION NO 17 MUST , IN ITS VIEW , BE UNDERSTOOD AS REFERRING TO THE TOTAL TURNOVER . LIKEWISE IN ALL THE OTHER CASES IN WHICH , IN THE COMMISSION ' S VIEW , REGARD MUST BE HAD TO TURNOVER IN ORDER TO FIX THE AMOUNT OF A FINE , IT IS THE TOTAL TURNOVER WHICH IS RELEVANT AND NOT THE TURNOVER RESULTING FROM THE TRANSACTIONS CONCERNED BY THE INFRINGEMENT . IT STRESSES HOWEVER THAT , OWING TO THE LARGE NUMBER OF UNQUANTIFIABLE CRITERIA TO BE*

*TAKEN INTO CONSIDERATION IN FIXING A FINE , NO MATHEMATICAL FORMULA OF GENERAL APPLICATION IS POSSIBLE .*

*118 UNDER THE TERMS OF ARTICLE 15 ( 2 ) OF REGULATION NO 17 , THE COMMISSION MAY IMPOSE FINES OF FROM 1 000 TO 1 000 000 UNITS OF ACCOUNT OR A SUM IN EXCESS THEREOF BUT NOT EXCEEDING 10% OF THE TURNOVER IN THE PRECEDING BUSINESS YEAR OF EACH OF THE UNDERTAKINGS PARTICIPATING IN THE INFRINGEMENT . ARTICLE 15 ( 2 ) PROVIDES THAT IN FIXING THE AMOUNT OF THE FINE WITHIN THOSE LIMITS THE GRAVITY AND THE DURATION OF THE INFRINGEMENT ARE TO BE TAKEN INTO CONSIDERATION .*

*119 THUS THE ONLY EXPRESS REFERENCE TO THE TURNOVER OF THE UNDERTAKING CONCERNS THE UPPER LIMIT OF A FINE EXCEEDING 1 000 000 UNITS OF ACCOUNT . IN SUCH A CASE THE LIMIT SEEKS TO PREVENT FINES FROM BEING DISPROPORTIONATE IN RELATION TO THE SIZE OF THE UNDERTAKING AND , SINCE ONLY THE TOTAL TURNOVER CAN EFFECTIVELY GIVE AN APPROXIMATE INDICATION OF THAT SIZE , THE AFOREMENTIONED PERCENTAGE MUST , AS THE COMMISSION HAS ARGUED , BE UNDERSTOOD AS REFERRING TO THE TOTAL TURNOVER . IT FOLLOWS THAT THE COMMISSION DID NOT EXCEED THE LIMIT LAID DOWN IN ARTICLE 15 OF THE REGULATION .*

*120 IN ASSESSING THE GRAVITY OF AN INFRINGEMENT REGARD MUST BE HAD TO A LARGE NUMBER OF FACTORS , THE NATURE AND IMPORTANCE OF WHICH VARY ACCORDING TO THE TYPE OF INFRINGEMENT IN QUESTION AND THE PARTICULAR CIRCUMSTANCES OF THE CASE . THOSE FACTORS MAY , DEPENDING ON THE CIRCUMSTANCES , INCLUDE THE VOLUME AND VALUE OF THE GOODS IN RESPECT OF WHICH THE INFRINGEMENT WAS COMMITTED AND THE SIZE AND ECONOMIC POWER OF THE UNDERTAKING AND , CONSEQUENTLY , THE INFLUENCE WHICH THE UNDERTAKING WAS ABLE TO EXERT ON THE MARKET .*

*121 IT FOLLOWS THAT , ON THE ONE HAND , IT IS PERMISSIBLE , FOR THE PURPOSE OF FIXING THE FINE , TO HAVE REGARD BOTH TO THE TOTAL TURNOVER OF THE UNDERTAKING , WHICH GIVES AN INDICATION , ALBEIT APPROXIMATE AND IMPERFECT , OF THE SIZE OF THE UNDERTAKING AND OF ITS ECONOMIC POWER , AND TO THE PROPORTION OF THAT TURNOVER ACCOUNTED FOR BY THE GOODS IN RESPECT OF WHICH THE INFRINGEMENT WAS COMMITTED , WHICH GIVES AN INDICATION OF THE SCALE OF THE INFRINGEMENT . ON THE OTHER HAND , IT FOLLOWS THAT IT IS IMPORTANT NOT TO CONFER ON ONE OR THE OTHER OF THOSE FIGURES AN IMPORTANCE DISPROPORTIONATE IN RELATION TO THE OTHER FACTORS AND , CONSEQUENTLY , THAT THE FIXING OF AN APPROPRIATE FINE CANNOT BE THE RESULT OF A SIMPLE CALCULATION BASED ON THE TOTAL TURNOVER . THAT IS PARTICULARLY THE CASE WHERE THE GOODS CONCERNED ACCOUNT FOR ONLY A SMALL PART OF THAT FIGURE . IT IS APPROPRIATE FOR THE COURT TO BEAR IN MIND THOSE CONSIDERATIONS IN ITS ASSESSMENT , BY VIRTUE OF ITS POWERS OF UNLIMITED JURISDICTION , OF THE GRAVITY OF THE INFRINGEMENTS IN QUESTION .*

*122 TO THE EXTENT TO WHICH RELIANCE IS TO BE PLACED ON THE TURNOVER OF UNDERTAKINGS INVOLVED IN THE SAME INFRINGEMENT FOR THE PURPOSE OF DETERMINING THE PROPORTIONS BETWEEN THE FINES TO BE IMPOSED , THE PERIOD TO BE TAKEN INTO CONSIDERATION MUST BE ASCERTAINED IN SUCH A WAY THAT THE RESULTING TURNOVERS ARE AS COMPARABLE AS POSSIBLE . THE SUBMISSIONS PUT FORWARD IN THIS RESPECT BY MDF AND PIONEER ARE NOT OF SUCH A NATURE AS TO INFLUENCE APPRECIABLY THE ASSESSMENT MADE BY THE COURT . THEREFORE IT IS NOT NECESSARY TO EXAMINE THOSE SUBMISSIONS IN DETAIL .*

*( D ) THE DURATION OF THE CONCERTED PRACTICES*

*123 ACCORDING TO MDF AND PIONEER , THE CONCERTED PRACTICES COULD ONLY HAVE COMMENCED ON 19 AND 20 JANUARY 1976 AT THE TIME OF THE ANTWERP MEETING . PIONEER AND MELCHERS OBSERVE THAT THE CONCERTED PRACTICE BETWEEN MDF , PIONEER AND MELCHERS WAS CONSUMMATED ON 27 JANUARY 1976 WHEN THE EMPLOYEES OF MELCHERS TOLD MR SCHREIBER THAT THE GOODS WOULD NOT BE DELIVERED . LASTLY , THE APPLICANTS MAINTAIN THAT THERE IS NO EVIDENCE THAT THE CONCERTED PRACTICE BETWEEN MDF , PIONEER AND SHRIRO CONTINUED FOR TWO YEARS . IT IS ARGUED THAT , AS THE DURATION OF THE INFRINGEMENT IS ONE OF THE FACTORS TO BE TAKEN INTO ACCOUNT IN FIXING A FINE , IT IS APPROPRIATE TO REDUCE THE FINES CONSIDERABLY ON THAT GROUND .*

*124 AS A RESULT OF THE FINDING THAT THE INFRINGEMENTS COMMITTED WERE CONFINED TO THE PERIOD ' ' LATE JANUARY/EARLY FEBRUARY ' ' AND IN VIEW OF THE FINDINGS RELATING TO MELCHER ' S REFUSAL TO SELL , IT IS NO LONGER NECESSARY TO DEAL WITH THESE SUBMISSIONS . THE DURATION OF THE CONCERTED PRACTICES ESTABLISHED BY THE COURT WILL ENTER INTO THE GENERAL ASSESSMENT TO BE MADE BY IT WITHIN THE FRAMEWORK OF ITS POWERS OF UNLIMITED JURISDICTION .*

*( E ) THE IMPOSITION OF A SINGLE FINE FOR TWO CONCERTED PRACTICES*

*125 ACCORDING TO MDF , THERE IS REASON TO BELIEVE THAT THE COMMISSION CONSIDERED THAT THE TWO CONCERTED PRACTICES IN WHICH MDF PARTICIPATED CONSTITUTE TWO DISTINCT INFRINGEMENTS . BY COMBINING THE FINES CALCULATED FOR EACH OF THOSE TWO INFRINGEMENTS INTO A SINGLE FINE , THE COMMISSION INFRINGED THE GENERAL PRINCIPLE*

*CONCERNING THE OVERLAPPING OF OFFENCES .*

*126 PIONEER , FOR ITS PART , CLAIMS THAT THE COMMISSION INFRINGED ITS RIGHT TO A FAIR HEARING BY IMPOSING ON IT A SINGLE FINE FOR TWO INFRINGEMENTS . IN THE ABSENCE OF A SPECIFIC FINE FOR EACH INFRINGEMENT , IT IS NOT POSSIBLE TO KNOW HOW THE COMMISSION ASSESSED THE GRAVITY OF EACH INFRINGEMENT OR WHETHER THE CRITERIA APPLIED IN CONSIDERING EACH INFRINGEMENT WERE PROPER .*

*127 IN THAT CONNECTION , IT SUFFICES TO OBSERVE THAT THE COMMISSION MAINTAINS THAT , IN THE CASE OF MDF AND PIONEER , IT TREATED THE INFRINGEMENTS AS A SINGLE OFFENCE AND THEREFORE IMPOSED A SINGLE FINE ON EACH UNDERTAKING . IN FACT , THERE IS NOTHING TO INDICATE THAT THE COMMISSION DID NOT FOLLOW THAT PROCEDURE , WHICH IS JUSTIFIED IN THE PRESENT CASE SINCE MDF AND PIONEER PARTICIPATED IN TWO CONCERTED PRACTICES WHICH WERE BOTH DESIGNED TO PREVENT PARALLEL IMPORTS TO A PARTICULAR COUNTRY OF GOODS PRODUCED BY THE SAME FIRM . THESE SUBMISSIONS MUST THEREFORE BE REJECTED , WITHOUT IT BEING NECESSARY TO EXPRESS A VIEW ON THE POSSIBLE EXISTENCE OF PRINCIPLES OF COMMUNITY LAW RELATING TO THE OVERLAPPING OF FINES IMPOSED FOR SEVERAL SEPARATE INFRINGEMENTS .*

*E - CONCLUSION*

*THE CLAIM FOR A DECLARATION OF NULLITY*

*128 AS STATED ABOVE IN PART A ( B ), THE FINDING RELATING TO THE DURATION OF THE INFRINGEMENTS MUST BE CONFINED TO THE PERIOD ' ' LATE JANUARY/EARLY FEBRUARY 1976 ' ' . THE DECISION MUST THEREFORE BE DECLARED VOID TO THE EXTENT TO WHICH IT FINDS THAT THE CONCERTED PRACTICES EXCEEDED THAT PERIOD . FOR THE REST , THE CLAIM FOR A DECLARATION OF NULLITY MUST BE DISMISSED .*

*THE CLAIM FOR A REDUCTION OF THE FINES*

*129 IN FIXING THE AMOUNT OF THE FINES REGARD MUST BE HAD TO THE DURATION OF THE INFRINGEMENTS ESTABLISHED AND TO ALL THE FACTORS CAPABLE OF AFFECTING THE ASSESSMENT OF THE GRAVITY OF THE INFRINGEMENTS , SUCH AS THE CONDUCT OF EACH OF THE UNDERTAKINGS , THE ROLE PLAYED BY EACH OF THEM IN THE ESTABLISHMENT OF THE CONCERTED PRACTICES , THE PROFIT WHICH THEY WERE ABLE TO DERIVE FROM THOSE PRACTICES , THEIR SIZE , THE VALUE OF THE GOODS CONCERNED AND THE THREAT THAT INFRINGEMENTS OF THAT TYPE POSE TO THE OBJECTIVES OF THE COMMUNITY .*

*130 IN RELATION TO THE CRITERIA USED BY THE COMMISSION IN FIXING THE FINES , REGARD MUST BE HAD IN PARTICULAR , IN THE CASE OF ALL THE UNDERTAKINGS , TO THE SHORTER DURATION OF THE INFRINGEMENTS RESULTING FROM THE PARTIAL NULLITY OF THE CONTESTED DECISION AND TO THE CONSIDERATIONS SET OUT ABOVE IN PART D ( C ) CONCERNING THE RELATIONSHIP BETWEEN THE TOTAL TURNOVER OF THE UNDERTAKINGS AND THE OTHER FACTORS TO BE TAKEN INTO ACCOUNT FOR THE PURPOSE OF DETERMINING THE GRAVITY OF THE INFRINGEMENTS .*

*131 ON THE BASIS OF ALL THOSE CONSIDERATIONS AND REGARD BEING HAD TO THE PARTICULAR CIRCUMSTANCES OF EACH OF THE UNDERTAKINGS , THE FINES SHOULD BE FIXED AS FOLLOWS .*

*132 AS REGARDS PIONEER , REGARD MUST BE HAD PARTICULARLY TO THE CENTRAL POSITION WHICH THAT UNDERTAKING OCCUPIES IN THE DISTRIBUTION NETWORK OF THE PRODUCTS IN QUESTION , WHICH ENABLED IT TO PLAY THE ROLE OF INTERMEDIARY IN EXERTING CONSIDERABLE INFLUENCE ON THE CONDUCT OF NATIONAL DISTRIBUTORS . IN RESPECT OF THAT UNDERTAKING THE FINE SHOULD BE FIXED AT 2 000 000 UNITS OF ACCOUNT , THAT IS TO SAY BFR 80 679 000 .*

*133 IN THE CASE OF MDF , WHICH WAS THE INSTIGATOR AND ESSENTIAL BENEFICIARY OF THE TWO CONCERTED PRACTICES , A FINE OF 600 000 UNITS OF ACCOUNT , THAT IS TO SAY FF 3 488 892 , SHOULD BE IMPOSED .*

*134 AS A RESULT OF THE PARTIAL NULLITY OF THE CONTESTED DECISION THERE IS NO DIFFERENCE BETWEEN THE DURATION OF THE TWO CONCERTED PRACTICES IN WHICH MELCHERS AND SHRIRO ( NOW PIONEER GB ) WERE INVOLVED . TO ESTABLISH THE RELATIONSHIP BETWEEN THE FINES TO BE IMPOSED ON THOSE TWO UNDERTAKINGS REGARD MUST BE HAD IN PARTICULAR TO THE FACT THAT SHRIRO WAS ENTIRELY DEPENDENT ON PIONEER IN THE PURSUIT OF ITS ACTIVITIES , WHEREAS MELCHERS , AS A RESULT OF THE DIVERSITY OF ITS ACTIVITIES , OF WHICH THE SALE OF PIONEER PRODUCTS CONSTITUTED ONLY A SMALL PART , COULD MORE EASILY HAVE RESISTED THE PRESSURE EXERTED UPON IT . REGARD BEING HAD ALSO TO ALL THE OTHER CIRCUMSTANCES OF THE CASES , THE FINE TO BE IMPOSED ON MELCHERS SHOULD BE FIXED AT 400 000 UNITS OF ACCOUNT , THAT IS TO SAY DM 992 184 , AND THE FINE TO BE IMPOSED ON PIONEER GB SHOULD BE FIXED AT 200 000 UNITS OF ACCOUNT , THAT IS TO SAY UKL 129 950 .*

*135 IN VIEW OF THE REDUCTION OF THE FINES DECIDED ABOVE AND THE FACT THAT SINCE THE DATE OF THE CONTESTED DECISION THE UNDERTAKINGS HAVE HAD THE USE OF THE SUMS IN QUESTION WITHOUT HAVING TO ARRANGE A GUARANTEE OR PAY INTEREST , THE SUBMISSIONS*

*PUT FORWARD BY MDF AND MELCHERS REGARDING THE DIFFICULTIES WHICH PAYMENT OF THE FINES WOULD ENTAIL FOR THEM MUST BE REJECTED . THAT APPLIES EQUALLY TO MDF ' S CLAIM TO BE ALLOWED TO PAY THE FINE IN SEVERAL INSTALMENTS . IT IS FOR THE COMMISSION TO DECIDE , IN AN APPROPRIATE CASE AND HAVING REGARD TO THE CURRENT FINANCIAL SITUATION OF THE UNDERTAKINGS , WHETHER IT IS DESIRABLE TO ALLOW PAYMENT TO BE DEFERRED OR EFFECTED IN INSTALMENTS .*

## Decision on costs

*COSTS*

*136 UNDER THE TERMS OF ARTICLE 69 ( 2 ) OF THE RULES OF PROCEDURE THE UNSUCCESSFUL PARTY IS TO BE ORDERED TO PAY THE COSTS IF THEY HAVE BEEN ASKED FOR IN THE SUCCESSFUL PARTY ' S PLEADING . HOWEVER , UNDER PARAGRAPH ( 3 ) OF THAT ARTICLE THE COURT MAY ORDER THE PARTIES TO BEAR THEIR OWN COSTS IN WHOLE OR IN PART WHERE EACH PARTY SUCCEEDS ON SOME AND FAILS ON OTHER HEADS OR WHERE THE CIRCUMSTANCES ARE EXCEPTIONAL .*

*137 SINCE EACH PARTY HAS FAILED ON CERTAIN HEADS , EACH MUST BEAR ITS OWN COSTS .*

## Operative part

*ON THOSE GROUNDS ,*

*THE COURT ,*

*HEREBY :*

*1 . DECLARES COMMISSION DECISION NO 80/256 OF 14 DECEMBER 1979 RELATING TO A PROCEEDING UNDER ARTICLE 85 OF THE EEC TREATY ( IV/29.595 - PIONEER HI-FI EQUIPMENT ) VOID TO THE EXTENT TO WHICH IT FINDS THAT THE CONCERTED PRACTICES EXCEEDED THE PERIOD LATE JANUARY/EARLY FEBRUARY 1976 ;*

*2.FIXES THE FINES IMPOSED ON THE APPLICANTS AS FOLLOWS :*

*IN THE CASE OF MDF ( CASE 100/80 ), 600 000 UNITS OF ACCOUNT , THAT IS TO SAY FF 3 488 892 ;*

*IN THE CASE OF MELCHERS ( CASE 101/80 ), 400 000 UNITS OF ACCOUNT , THAT IS TO SAY DM 992 184 ;*

*IN THE CASE OF PIONEER ( CASE 102/80 ), 2 000 000 UNITS OF ACCOUNT , THAT IS TO SAY BFR 80 679 000 ;*

*IN THE CASE OF PIONEER GB ( CASE 103/80 ), 200 000 UNITS OF ACCOUNT , THAT IS TO SAY UKL 129 950 ;*

*3.DISMISSES THE APPLICATIONS FOR THE REST ;*

*4.ORDERS EACH PARTY TO BEAR ITS OWN COSTS .*